138-635
138-635

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1406.

THE COUNTY OF COOK, PLAINTIFF IN ERROR,

vs.

THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

RECORD FILED OCTOBER 13, 1890.

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a In the Supreme Court of the United States. October Term, A. D. 1890.

THE COUNTY OF COOK, Plaintiff in Error,
vs.
THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY, Defendant in Error.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that in printing the record in said cause for the purpose of argument and submission in this court it shall not be necessary to print the following portions of the transcript of the record therein, and the clerk of said court is hereby directed to cause the same to be omitted from the printed transcript of the said record, to wit:

The summons in said cause, on page 4.

The record of taxation of costs in the circuit court of Cook county, appearing on pages 7 and 8 in the said transcript of record.

The order of April 4, 1887, of said circuit court of Cook county for retaxation of costs, appearing on page 9.

Motion of said Cook County to set aside order granting new trial, and order of circuit court of Cook county overruling said motion, appearing on pages 9 and 10.

The order of said circuit court of Cook county of Jan. 28, 1888, on page 11.

Bill of exceptions, filed June 4, 1887, *nunc pro tunc* as of April 25th, 1887, presenting evidence offered on motion of plaintiff for retaxation of costs and setting aside order granting new trial, same being from page 13 to page 76 of said transcript.

b The deposition of Elam G. Clark, appearing on pages 107 and 108.

The deposition of John Klineman, appearing on pages 108 and 109.

The deposition of Thomas Gaugen, appearing on pages 109 and 110.

The deposition of Robert W. Dobson, appearing on pages 110 and 111.

Also the several depositions of Mrs. Bennett, Charles Reese, Thomas Hoyle, Michael Doyle, William Rankin, Thomas Hoyle, Matthew Iverson, and Adam Neebe, appearing on pages 111 to 116, inclusive.

Also the 1st, 2nd, and 3rd of plaintiff's propositions of law, which appear on page 117.

The opinion of Judge Waterman in circuit court, finding for the defendant, which appears on pages 124 to 143 of said transcript of the record.

Also the original opinion of the supreme court of Illinois reversing the judgment of the circuit court, which appears on pages 150 to 155, inclusive, and the judgment of reversal and mandate of the said supreme court, which appears on pages 156 of said transcript.

Also writ of error and bond need not be printed in full; and it

will be sufficient to state in printed record that said writ issued and that bond for $1,000 was duly approved and filed, and in printing the petition for writ of error the opinion of the supreme court of Illinois, appearing therein, may be omitted.

This stipulation is made for the purpose of designating, in
c in accordance with paragraph 9 of rule 10 of the United States Supreme Court, the parts of the record which both the plaintiff and defendant in error do not consider necessary for the consideration of the questions presented in this court.

CONSIDER H. WILLETT,
Attorney for Plaintiff in Error.
CHARLES M. OSBORN AND
SAM'L A. LYNDE,
Counsel for the Def't in Error.

[Endorsed:] Sup. Court U. S. Oct. term, 1890. No. 1406. The County of Cook, pl'ff in error, *vs.* The Calumet & Chicago Canal Dock Co. Stipulation to omit certain portions of transcript of record in printing. Filed Oct. 13, 1890.

1 UNITED STATES OF AMERICA:

Supreme Court State of Illinois. June Term, 1888.

At a supreme court begun and held at Springfield, on the first Tuesday in the month of June, in the year of our Lord one thousand eight hundred and eighty-eight, the same being the fifth day of June, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: Alfred M. Craig, chief justice; John M. Scott, justice; Simeon P. Shope, justice; John Scholfield, justice; Benj. D. Magruder, justice.

Be it remembered that afterwards, to wit, on the sixth day of June, in the year of our Lord one thousand eight hundred and eighty-eight, a record was filed in said supreme court; which said record was in words and figures as follows, to wit:

2 UNITED STATES OF AMERICA:

STATE OF ILLINOIS, } *ss:*
County — Cook, }

Pleas before the Honorable A. N. Waterman, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 16th day) of January, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

Present: Honorable A. N. Waterman, one of the judges of the circuit court of Cook county, State of Illinois; Joel M. Longenecker, State's attorney; Canute R. Matson, sheriff.

Attest: HENRY BEST, *Clerk.*

Be it remembered that heretofore, to wit, on the 31st day of January, A. D. 1883, the County of Cook, by Charles H. Wood and Consider H. Willett, Esq., its attorneys, filed in said court its certain declaration and caused to — issued out of and under the seal of said court the people's writ of summons, directed to the sheriff of Cook county to execute; which said declaration and writ with the sheriff's return thereon endorsed, are in words and figures as follows, to wit:

STATE OF ILLINOIS,
The County of Cook, } ss:

3 In the Circuit Court, to the January Term, A. D. 1883.

THE COUNTY OF COOK, Plaintiff,
vs.
THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY. } In Ejectment.

The County of Cook, a municipal public corporation organized and acting under the laws of the State of Illinois, plaintiff, by Charles H. Wood and Consider H. Willett, its attorneys, complains of The Calumet and Chicago Canal and Dock Company, a corporation organized and acting under the laws of the State of Illinois, defendant, of a plea of ejectment, for that, on the first day of September, A. D. 1882, the plaintiff was possessed of a certain parcel of land, with the appurtenances, lying in the county of Cook aforesaid, to wit, the southwest quarter (S. W. $\frac{1}{4}$) of section seven (7), town. (37) thirty-seven north, range (15) fifteen east, of the third principal meridian, north of the Indian boundary line (except a strip of land fifty feet wide occupied by the tracts of the Irondale Branch of the Chicago & Rock Island railroad, containing $\frac{31}{100}$ acres), containing forty-six and forty-eight one hundredth acres ($46\frac{48}{100}$ ac.), more or less, which said tenements the plaintiff claims in fee; and the plaintiff being so thereby possessed, the defendant afterwards, to wit, on the 2nd day of September, A. D. 1882, entered into the said tenements and now unlawfully withholds from the plaintiff the possession thereof, to the damage of the plaintiff of fifty thousand dollars, and therefore it brings its suit.

4 CHARLES H. WOOD AND
CONSIDER H. WILLETT,
Plaintiff's Attorneys.

* * * * * * *

And thereupon, on the 20th day of February, A. D. 1883, there was filed in said cause a certain plea, which is in the words
5 and figures following, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court, to the February Term, A. D. 1883.

CALUMET AND CHICAGO CANAL AND DOCK COMPANY } Ejectment.
ats.
THE COUNTY OF COOK. }

And the defendant, by Cohrs, Dearbon and Shope, its attorneys, comes and defends the wrong and injury, when, etc., and says that the said defendant, The Calumet and Chicago Canal and Dock Company is not guilty of unlawfully withholding the tenements or lands in said declaration mentioned or any part thereof, in manner and form as the plaintiff has above thereof complained against said defendant; and of this the defendant puts himself upon the country, etc.

COHRS, DEARBON & SHOPE,
Att'ys for Defendant.

And afterwards, to wit, on the 15th day of February, A. D. 1886, the following, among other proceedings, was had before the Hon. John G. Rogers, then one of the judges of said court, and entered of record therein, to wit:

6 THE COUNTY OF COOK
vs.
CALUMET AND CHICAGO CANAL AND DOCK COMPANY. } 43690. Ejectment.

This day come said parties, by their respective attorneys, and by agreement submit said cause to the court for trial without the intervention of a jury; and thereupon the court, after hearing part of the evidence, doth order that said cause be and it is continued for further hearing until to-morrow.

And afterwards, to wit, on the first day of March, 1886, the following, among other proceedings, was had before the Hon. John G. Rogers, then one of the judges of the said court, and entered of record therein, to wit:

THE COUNTY OF COOK
vs.
CALUMET AND CHICAGO CANAL AND DOCK COMPANY. } 43690. Ejectment.

This day come again the said parties, by their respective attorneys, and thereupon the court, having had said cause under advisement and being now fully advised in the premises, finds that said plaintiff is entitled to an estate in fee simple in and to the premises in question, whereupon the said defendant, by its attorneys, moves the court to set aside said finding and for a new trial of said cause. On consideration whereof the court doth overrule said motion; to

which finding and ruling of the court the said defendant, by its attorneys, now here excepts.

7 Whereupon it is ordered and considered by the court that said Cook County, plaintiff, recover of said Calumet and Chicago Canal and Dock Company, defendant, possession of the premises in the said declaration mentioned, to wit, the S. W. $\frac{1}{4}$ of sec. 7, T. 37 N., R. 15 east, of the 3rd P. M., north of the Indian boundary line (except a strip of land fifty feet wide occupied by the tracks of the Irondale Branch of the Chicago and Rock Island Railroad, containing $\frac{31}{100}$ acres), containing $46\frac{48}{100}$ acres, more or less, and that a writ of possession issue therefor; and it is further considered by the court that said plaintiff recover of said defendant its costs in this behalf expended, to be taxed, and have execution therefor; to all of which the said defendant, by its attorneys, now here excepts, and prays an appeal to the supreme court of the State of Illinois, which is granted on condition that said defendant doth, within twenty days from date, execute and file an appeal bond in said cause in the penal sum of two hundred dollars, with good and sufficient security thereto, to be approved by the court or by the clerk of this court; and it is further ordered that the said defendant be and it is allowed thirty days from date in which to prepare and file a bill of exceptions in said cause.

* * * * * * *

8 And afterwards, to wit, on the 25th day of January, A. D. 1887, the following, among other, proceedings were had before the Hon. Lorin C. Collins, then one of the judges of said court, and entered of record therein, to wit:

COOK COUNTY *vs.* CALUMET AND CHICAGO CANAL AND DOCK COMPANY.	43690.	Ejectment.

And at this day it appearing to the court that said defendant has paid all the costs which have accrued in said cause to date, therefore, on its motion and the certificate of the clerk, filed herein this day, by its attorneys, it is ordered that a new trial of said cause be, and the same is hereby, granted in pursuance of the statute in such case made and provided.

* * * * * * *

9–10

COOK COUNTY *vs.* CALUMET AND CHICAGO CANAL AND DOCK COMPANY.	43690, 265½.	Ejectment.

This day again come the said parties by their respective attorneys, and thereupon the court, after hearing further and concluding arguments of counsel and not yet being fully advised in the premises, takes said cause under advisement.

* * * * * * *

11 And afterwards, to wit, on the 6th day of October, 1887, the following among other proceedings, was had before the Hon. A. N. Waterman, then one of the judges of said court, and entered of record therein, to wit:

COOK COUNTY *vs.* CALUMET AND CHICAGO CANAL AND DOCK COMPANY.	43690.	Ejectment.

This day come the said parties, by their respective attorneys, and by agreement submit said cause to the court for trial without the intervention of a jury; and thereupon the court, after hearing part of the testimony, continues said cause for further hearing until to-morrow.

* * * * * * *

12 And afterwards, to wit, on the first day of February, 1888, the following, among other proceedings, was had before the Hon. A. N. Waterman, then one of the judges of said court, and entered of record therein, to-wit:

COOK COUNTY *vs.* CALUMET AND CHICAGO CANAL AND DOCK COMPANY.	43690.	Ejectment.

This day comes on to be heard the motion of said plaintiff to set aside the finding of the court entered herein on January 28th, 1888, and for a new trial of said cause, and was argued by counsel; and the court, being fully advised in the premises, doth overrule said motion. Wherefore it is ordered and considered by the court that said defendant go hence without day and recover of said plaintiff its costs in this behalf expended, to be taxed; to all of which the said plaintiff, by its attorneys, now here excepts, and prays an appeal to the supreme court of the State of Illinois, which is granted on condition that said plaintiff prepare and file a bill of exceptions in said cause within thirty days from the date hereof.

And afterwards, to wit, on the 27th day of February, 1888, the following, among other proceedings, was had before the Hon. A. N. Waterman, then one of the judges of said court, and entered of record therein, to wit:

13–75	COUNTY OF COOK *vs.* CALUMET AND CHICAGO CANAL AND DOCK COMPANY.	43690.	Ejectment.

And now, at this day, on motion, it is now here ordered by the court, *nunc pro tunc* as of February 1st, 1888, that this cause be taken to the supreme court at Springfield, Illinois, for the June term, 1888,

of said court, and that the time in which to file bill of exceptions in said cause be, and it is, extended ten days longer.

* * * * * * *

76 In said cause a bill of exceptions was filed February 27, 1888, in words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court.

THE COUNTY OF COOK, Plaintiff,
vs.
CALUMET AND CHICAGO CANAL AND DOCK COMPANY, Defendant. } Bill of Exceptions.

Be it remembered that on the trial of this cause, when the same was reached and called by his honor Judge A. N. Waterman, judge of said court, on the 6th day of October, A. D. 1887, the plaintiff objected to the jurisdiction of the court to try said cause on the ground that, the defendant not having paid all the costs of the first trial of said cause, the judgment entered March 1st, 1886, was final, and the order of January 25th, 1887, vacating the same was a nullity because the defendant within a year from the rendition of said judgment did not pay all the costs, which was essential to give the court jurisdiction; that Judge L. C. Collins, of this court, had no jurisdiction January 25th, 1887, to enter the order granting a new
77 trial, under the statute, because the defendant had not paid the costs in said cause when said order was entered, and the same was without notice to the plaintiff.

In support of this objection the plaintiff offered in evidence the bill of exceptions filed in said cause June 4th, 1887, *nunc pro tunc* as of April 25th, 1887, together with the exhibits and documents referred to in said bill of exceptions; to which evidence the defendant then and there objected, but the court admitted the same subject to all objections; to which action of the court the defendant then and there excepted. Plaintiff then read said evidence in words and figures as follows. (Said bill of exceptions is the same as that first copied into this record, to which reference is made.)

The plaintiff then renewed its motion that the court had no jurisdiction to try said cause as aforesaid; which motion the court overruled and directed said cause to be tried; to which ruling the plaintiff then and there excepted. Thereupon the plaintiff, to maintain the issues upon its part on the merits, offered in evidence a certified copy of a certificate of the Commissioner of the General Land Office, dated October 29th, 1853; to which certificate the defendant objected, but the court overruled said objection; to which the defendant then and there excepted and permitted said certificate to be read in words and figures as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *January 11th*, 1884.

78 I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed paper, marked "A" and containing one page, is a true and literal exemplification of so much of the list of swamp selections returned to the General Land Office by the surveyor general October 29th, 1853, as relates to the S. W. fractional ¼ of section 7, north of Indian boundary, in township 37 north of range 15 east of 3rd principal meridian, Illinois, which list is now on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.]

N. McFARLAND,
Com'r of Gen. Land Office.

List of Swamp and Overflowed Lands in Chicago District, Township North of the Base Line and East of the 3rd Principal Meridian, in the State of Illinois.

Tracts.	Sec.	Town.	Range.	Merid.	Acres.	Remarks.
*	*	*	*	*	*	*
S. W. ¼	7	37 N.	15 E.	3rd	46 48/100	North of Indian boundary; vacant.
*	*	*	*	*	*	*

OFFICE OF THE SURVEYOR GENERAL FOR
ILLINOIS AND MISSOURI,
ST. LOUIS, *29th of October*, 1853.

I, John Loughborough, surveyor general for the States of Illinois and Missouri, do hereby certify that the foregoing
79 list is a correct transcript of the original lists of selections made by the State agents and filed by them in this office, to wit, Daniel F. Hitt, for the county of La Salle; Daniel W. Lamb, for the county of De Kalb; Yates V. Beebe, for the county of Boone; Parry A. Armstrong, for the county of Grundy; William W. Winn, for the county of Kendall; W. A. Tanner, for the county of Kane; George Hale, for the county of Lake; Jeddiah Wooly, for the county of Will; T. H. Campbell, for the county of Iroquois, and John Van Horn, for the county of Cook, all of which counties are in whole or in part in the land district of Chicago, State of Illinois; that I have carefully compared the same with the field-notes, township plats, and other evidences on file in this office, and am satisfied the greater part of each forty-acre tract or other equivalent subdivision of the lands embraced in said list is swampy or subject to overflow within the meaning of the act of Congress of the 28th of September, 1850, and that said lands rightfully enure to the State of Illinois under said act.

JOHN LOUGHBOROUGH,
Surveyor General.

A copy was sent to the register on the 29th of October, 1853.

And the plaintiff also offered a certificate of the State auditor of the State of Illinois, dated February 2nd, 1882; to which evidence the defendant objected generally and on the ground that such
80 certificate was not such a one as is required by the act of the Legislature of Illinois of 1852 or 1854; which objections the court overruled; to which rulings the defendant then and there excepted, and said auditor's certificate was then read in evidence in words and figures as follows:

Swamp Land.

Parts of sections.	Sections.	Townships.	Ranges.	Surveyed area.		Unsurveyed area.		Total area.	
				Acres.	H'dth.	Acres.	H'dth.	Acres.	H'dth.

No. 4.—A list of swamp and overflowed lands selected as enuring to the State of Illinois under the provisions of the act of Congress approved September 28, 1850, in the district of lands subject to sale at Chicago, now Springfield, Illinois.

(E. ½ of S. W. ¼	13	45 N.	9 E.	80					
S. W. ¼ of S. W. ¼	13	" "	"	40					
N. E. ¼ of S. W. ¼	11	45 "	10 "	40					
N. W. ¼ of N. W. ¼	1	31 "	12 "	40	48				
S. E. ¼ " S. W. ¼	11	" "	"	40					
W. fr'l ½ of S. W. ¼	19	37 "	13 "	66	64)	out.			
S. W ¼, N. I. B. L.	7	37 "	15 "	46	48				

GENERAL LAND OFFICE, *May* 7, 1866.

This is to certify that the foregoing tracts of land were duly selected and reported to this office as swamp land prior to the passage of the confirmatory act of Congress of March 3rd, 1857.

W. W. CURTIS.

GENERAL LAND OFFICE, *May* 7, 1866.

81 Respectfully submitted for approval.

J. M. EDMUNDS,
Commissioner.

DEPARTMENT OF THE INTERIOR, *May* 8, 1866.

The foregoing list of selections is hereby approved, subject to any valid legal rights that may exist to any of the tracts therein described.

JAMES HARLAN, *Sec'y.*

GENERAL LAND OFFICE, *May* 10*th*, 1866.

I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the foregoing is a true copy of approved list No. 4 of swamp and overflowed lands selected as enuring to the

State of Illinois under the act of Congress approved September 28, 1850, in the district of lands subject to sale at Chicago (now Springfield), Illinois.

[SEAL.] In testimony whereof I have hereunto subscribed my name and caused to be affixed the seal of the General Land Office, at the city of Washington, the day and year above written.

J. M. EDMUNDS, *Com'r.*

AUDITOR'S OFFICE, ILLINOIS,
SPRINGFIELD, *July 2nd*, 1884.

I, Charles P. Swigert, auditor of public acccounts of the State of Illinois, do hereby certify that the foregoing and
82 annexed instrument is a true, full, and correct copy of "A list of swamp and overflowed lands" now on file in and forming part of the records of this office.

In witness whereof I have hereunto subscribed my name and affixed the seal of my office, at Springfield, the day and the year first above written.

[SEAL.] CHARLES P. SWIGERT,
Auditor of Public Acc.

The plaintiff rests.

And it was at the time stipulated that upon this trial either party might read from Lester's Land Laws and from Copp's Public Land Laws with the same effect as though the same were general statutes of the United States or of the State of Illinois, and said volumes or portion thereof might with that effect be cited upon the argument in this court or in any court to which this cause may be taken by appeal or writ of error, and as though the same had been put in evidence upon the trial of said cause.

The defendant, to maintain the issues on its part, introduced in evidence a certified copy of a certificate of the register and receiver of the United States land office at Chicago, Illinois, dated October 20th, 1853, to William B. Egan, but not the endorsements made thereon or the entries upon the face thereof; to which evidence the plaintiff objected on the ground that if said paper was put in evidence the whole paper must go in, and also on the ground
83 that such title was subsequent to the swamp-land grant under which the plaintiff claimed, and also on the ground that said certificate showed upon its face that it was cancelled; but the court, holding that all of said paper, including the endorsements or entries upon its face, should be in evidence, subject to all objections, allowed the same to be read; to which rulings the plaintiff then and there excepted, and the defendant, excepting to the ruling upon the endorsements and writing on said certificate, read said copies of said certificate in evidence in words and figures as follows:

Military bounty land act of March 22, 1852.

Land Warrant No. 2495.

Register and Receiver's No. 34.

LAND OFFICE, *Oct.* 20, 1853.

We hereby certify that the attached military bounty land warrant No. 2495 was on this day received at this office from William B. Eagan, of Cook county, State of Illinois.

JAMES LONG, *Register.*
ELI B. WILLIAMS, *Receiver.*

I, William B. Eagan, of Cook county, State of Illinois, hereby apply to locate, and do locate the southwest fractional ¼, N. I. B. L., of section No. (7) seven, in township No. (37) thirty-seven N. of range No. 15 E., in the district of lands subject to sale at the land office at Chicago, containing $46\frac{48}{100}$ acres, in satisfaction of the attached warrant, numbered 2495, issued under the act of 22nd of March, 1852.

[Written across the face:] Cancelled. See letter to R. R. at Springfield, Aug. 10, 1855. Binckley.

[Written across the face in red ink:] Reinstated Feb. 15, 1883. W't 101,043, act of 1850, 40 a, substituted.

84 Witness my hand this 20th day of October, A. D. 1853.

WILLIAM B. EAGAN.

Attest:
JAMES LONG, *Register.*
ELI B. WILLIAMS, *Receiver.*

I request the patent to be sent to —— ——.

LAND OFFICE, CHICAGO, *Oct.* 20, 1853.

We hereby certify that the above location is correct, being in accordance with law and instructions.

JAMES LONG, *Register.*
ELI B. WILLIAMS, *Receiver.*

Endorsements: 40 acres. 2495. 40. Chicago, Ill. W't 101,043, act. 18—, 40 acres, substituted for the above number Feb'y 15, 1883. Cancelled. See letter to reg'r, Springfield, Ill., Aug't 10, 1855. Binckly. Cancellation noted on tract book. 17 Nov'r, 1855. R. W. B. B. K. Reinstatement noted Feb'y 15, 1883. See cash
85 entry No. 29521, Springfield. Lawrence. Approved. —— ——, clerk. Patented ——. Recorded ——.

This location is reinstated and warrant No. 101,043 for 40 acres, act of Sept. 28, 1850, substituted for w't No. 2495 for 40 acres, act of 1852, in div. K., February 15, 1883.

E. KILLPATRICK.

Div. "K."

See letter in div. "K" to Cohrs, Dearbon & Shope, Chicago, Ills. Feb. 15, 1883.

(*Memorandum.*)

This entry is in conformity with Com. letter Sep. 13, 1883. The cash part was paid Feb'y 28, 1853.

JAMES LONG, *Register.*

W't susp., however, for erasure; party desires its location cancelled. See reg. (Chicago) letter of May 28, 1855, cancelled therefor, and party allowed to relocate with another wt' No. 101,043. Aug. 10, 1855.

M. L. 25029. DEPARTMENT OF THE INTERIOR,
B. GENERAL LAND OFFICE, *April* 25, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copies are true and literal
86 exemplifications from the files of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
[SEAL.] *Commissioner of the General Land Office.*

The defendant offered in evidence certified copy from Secretary of the Interior withdrawing land from sale, as follows, to which plaintiff objected; but court overruled said objection; to which plaintiff excepted, and the same was admitted in evidence:

DEPARTMENT OF INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 6, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copy of telegram from this office of September 19, 1850, and copy of letter from this office of September 20, 1850, to the register and receiver at Chicago, Illinois, ordering the withdrawal of lands granted by the act of September 20, 1850, for a railroad from Chicago, Illinois, to Mobile, Alabama, are true and literal exemplifications of the orginals from the records of this office.

In testimony whereof I have hereunto subscribed my name
87 and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
[SEAL.] *Com'r of Gen. Land Office.*

GENERAL LAND OFFICE, *Sept.* 19, 1850.

Reg'r & recor., Chicago, Illinois:

Withhold from sale or entry till further orders all the lands in townships 31 to 34, R. 4 E.; townships 31 & 32, R. 9 E.; 31 to 36,

inclusive, R. 10 E.; 31 to 38, incl., R. 11 E.; 31 to 41, incl., R. 12, 13, and 14 E.; 31 to 38, R. 15 E.

J. BUTTERFIELD,
Commissioner.

GENERAL LAND OFFICE, *Sept.* 20, 1850.

Reg'r & recor., Chicago, Illinois:

GENTLEMEN: In order to secure to the States of Illinois, Mississippi, and Alabama, and to the General Government the benefits of the acts recently passed by Congress granting the right of way and making a grant of lands to those States in aid of the construction of a railroad from Chicago to Mobile, the President has directed that the lands within a suitable distance on each side of the supposed route of that road shall be withheld from sale "until
88 the road is located and lands selected," provided the time does not exceed six months.

You will therefore withhold from sale or entry of any kind till further orders all the lands in townships 31 to 34, range 4 east; townships 31 and 32, range 9 east; 31 to 36, inclusive, R. 10 E.; 31 to 38, inclusive, R. 11 E.; 31 to 41, inclusive, ranges 12, 13, and 14 east; 31 to 38, R. 15 E.

Before these lands are again subject to private entry or location they must be brought into market by proclamation of the President or after thirty days' public notice.

Should application be made to enter any of these lands by preemption, you will please keep a memorandum of the name of the applicant, description of the tract, and date of application, that action may be had on the case after the road is located and the lands selected.

Very respectfully your ob't serv't,

J. BUTTERFIELD,
Commissioner.

And it was admitted that said lands were restored to market by proclamation of the President April 3, 1852, and to which evidence so stipulated the plaintiff objected; but the court overruled the objection and the plaintiff excepted; and opinion of McClellan, Secretary of Interior, as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March 5th*, 1883.

I, N. C. McFarland, Commissioner of the General Land
89 Office, do hereby certify that the annexed paper, marked "A," containing thirteen pages, is a true and literal exemplification of the letter of the Secretary of the Interior dated Nov. 20, 1885, as the same remains on file in this office.

In testimony whereof I hereunto subscribe my name and cause the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. C. McFARLAND,
Com'r of Gen. Land Office.

"A."

DEPARTMENT OF THE INTERIOR, *November 20th*, 1855.

SIR: I herewith return the papers in relation to the swamp and overflowed lands in Illinois which accompanied your report of the 16 ult. on the points involved in a communication from the Governor of that State of the 28th of September last and an argument subsequently filed by Judge Scates, the agent appointed by the Governor. I also accompany the same with various letters and arguments subsequently filed in the Department on the matters in dispute, so that one file thereof may be preserved for further reference.

On the passage of the act of 20th Sept., 1850, making a grant for the Mobile and Chicago railroad, a reservation was
90 made by order of the President at its date of a quantity of land fifteen miles in width on each side of the line of said road, in Illinois, according to the locality then assigned it, and which was very near that which it was shown ultimately to have assumed; that the object of said reservation was to preclude any further sale or disposition after the 20th Sept., aforesaid, 1st, of any land within the six-mile limits of said road, because of the grant to the State of the odd sections therein and the enhanced minimum of the even sections therein, and which the long-established usage of the Department required to be offered at public sale before subject to entry at such advanced price; and, 2nd, of any land in the alternate sections without the six and within the fifteen mile limits, which were granted to the State to the extent of the aggregate deficiencies in the alternates within between the full contents of the latter alternates and the quantity vacant at the date of the grant. The State, through its proper agents, made the selections without the six-mile limits, and the whole grant (with the exception of trifling balances arising from mistakes and conflictions) was adjusted and certified on the 13th of March, 1852, and subsequently, in July, August, and September, 1852, the land within the six-mile limits was offered at public sale under a proclamation of the President, dated 3rd of April, 1852, it directing that after the public sale at each respective land office the land without the six miles and within the fifteen-mile limits should be restored to market (except as two of the
91 said offices in which no double-minimum lands existed and in relation to that within the fifteen-mile limits specific periods were given as to their restoration) and the sales of the double-minimum land under that proclamation and since have been patented and the patents delivered to the purchasers.

On the 28th September, 1850, Congress passed the swamp-land act, so called, and under it certain instructions were issued for carrying it into effect, embracing substantially these propositions, that where the filed notes of survey indicate the swampy character of the land they are to be regarded as conclusive of such character, and that where other land is claimed by the State as such it shall be by selections made by duly authorized agents of the State and accompanied by their affidavits that they have examined the said land, and, being acquainted with the mode of surveying the public land,

that the greater part of each forty-acre tract included in such selections is swampy and of the character contemplated by the act. Many of these selections, not only in Illinois, but elsewhere, were alleged to be good arable land and applications for the purchase thereof were made as to land of the United States, and to which the States respectively had no valid claim under the swamp-land act, and from facts brought to the knowledge of the General Land Office a rule obtained to allow parties to apply for land under these circumstances and if, after examination into the question of fact, after notice to the agents of the State, it was satisfactorily shown that the averment of the applicant was true he was allowed to pur-
92 chase the same and the tract or tracts were stricken from the list of selections and the same excluded from the list and plat directed by the act to be made out by the Secretary of the Interior, and which list was to be the basis of the perfect grant by a patent to the State, rendered necessary by the law to divest the United States of the fee-simple title.

Much effort was made from time to time to hasten the selections by the various States of this swamp land without avail. Without closing each land office and stopping all the operations thereof until the swamp-land selections were all made and reported, the Department was compelled to suffer ordinary entries and locations to progress with no other security against conflictions than would arise from the fact that purchasers were aware that land really swamp was not subject to legal sale or location. Before the receipt of any selection from Illinois (the first list of selections embracing land in the Kaskaskia district having been mailed to the surveyors general of Illinois and Missouri on the 10th October, 1853) many sales and locations had been made conflicting with lands subsequently reported as swamp land. These conflictions in various States had become so numerous and involved interests to such an extent that Congress, on the 2nd March, 1855, passed an act directing the President to issue patents on all such sales and locations, to pay the State the money received by the Government for the land sold, and to allow it to locate other land in lieu of that taken by millitary warrants and scrip whenever the Commissioner of the Land Office should decide (upon proofs to be submitted to him) and the
93 Secretary of the Interior should confirm the decision that the land so patented was of the character contemplated to have been embraced by the swamp-land act.

Under this state of facts Illinois claims all the unsold swamp land on the 28th September, 1850, within the double-minimum sections notwithstanding its reservation by the President on the 20th September for the purposes of the act of the latter date, all the unsold swamp land without the six and within the fifteen mile limits; notwithstanding the grant of the alternate sections therein in whole or in part by the previous act of the 20th September aforesaid, and its reservation by the President for the satisfaction of that grant, and she now not only prefers this claim for the land, notwithstanding the act of 2nd March, 1855 (except where her grantees, the several counties in the State, may elect to take the money or other land), but

she insists that the extent and character of her claim shall be determined by the lists she has furnished in accordance with the general instructions to the advisory agents of the Secretary of the Interior, notwithstanding all or any allegations of fraud or illegality in said selections, and she also objects to the mode which has been and is being practiced in regard to the lands so selected by permitting applications therefor by others, and citing her agents at various times and places to defend such selections by additional proof as to their validity.

I have examined the whole subject with much care and perused the various arguments in behalf of the State and of other
94 interests involved, and I am constrained to arrive at the conclusions—

That the State had no right under the act of 28th of September, 1850, to any of the land within the six-mile limits which had been reserved by the President under act of 20th of September, 1850, for the special purposes of that act, to wit, the reimbursement of the Government for the granted lands. The practice of the Government from the earliest period was to reoffer at public sale enhanced minimum lands before they could be disposed of at all, and the ordinary entry at private sale, the attachment of pre-emptions, and every other mode of disposition under prior laws having as wide a scope as to lands of the United States as the swamp-land act terminated with the law of 20th of September, 1850, and the reservation of the President, with a view to the execution of the special purposes and obvious design of the latter act. The concurrence in this view of the force and effect of this and other acts is shown by all the legislation of Congress on the subject of these double minimum and reserved lands, special legislation having been necessary from time to time with a view of embracing them within the pre-emption privilege and rendering them liable to location by military warrants and the offering them at public sale after ninety days' public notice through a proclamation of the President, without objection on the part of the State, should preclude her now from setting up title adverse to the patentees of the same land, who by her standing silently by were encouraged to make such purchases.

95 That she has no right under the swamp-land act to the lands within the fifteen-mile limits selected by her own agents under the grant to her by the prior railroad act, and which latter selections have long since been certified to her and by her disposed of to other parties in fee. The latter-mentioned act was earlier in date. The reservation by the President came in aid of that law, to enable him to separate the granted from the ungranted land for the purposes of the railroad, and the grant being of the alternate sections to the extent of the deficiency arising from the sold portions of the alternates within the six miles they were as much the subject of present grant in place outside of the six miles as within, to the extent of the said deficiencies, which might or might not absorb the whole, and that it therefore necessarily included what might have been swamp land in such alternate sections. The General Land Office appears to have regarded the fifteen-mile limits as

merely withdrawn from market by the President for the purpose of ascertaining with due certainty the granted land under act of 20th September, 1850, as it has sanctioned selections within those limits as swamp land, not interfering with the prior grant, regarding the purposes of the law under the first act as accomplished when the extent of the grant was ascertained and the actual reservation under the authority of the law, in regard to the land therein, as extending only to those tracts necessary to complete the grant for the railroad.

96 With this determination, making both laws harmonize with each other as far as practicable and extending the provisions of the later law to its utmost equitable limits, I have no disposition to interfere, believing that substantial justice has been done to the State under both laws, and even beyond what would have been accorded under a more rigid exercise of the rule with regard to reservation.

That in regard to the act of 2nd March, 1855, its provisions are mandatory, and no selections conflicting with sales or locations with military warrants or scrip can be approved, attested, and patented to the State, but must be patented to the purchasers or locators and the purchase-money or other land given to the State upon her compliance with the terms of that law and the instructions of the Department as to the proofs of the swampy character of the land embraced in such sales or locations.

That the extent and character of her claim is not determined by the selections reported by her agents wherever I am satisfied that fraud, illegality, or error exists. The law imposes the duty on me of making accurate lists of this swamp land, and although it is evident that they cannot be done except through the agency of other persons it was not designed that when I had taken the necessary means in a general way of arriving at results my judgment and conscience were to be entirely surrendered and I be made the more passive instrument to carry out the acts of these agents to any extent indicated by their compliance with the forms of the instructions given them.

97 I feel bound to withhold my sanction whenever I have good ground to believe that illegal and improper selections have been made until I am satisfied of the contrary, but convinced by experience that the existing mode of determining these questions of conflict is onerous and oppressive to the States I think a change is called for, and I have no doubt a plan can be devised which, whilst it will protect the public interests, can be made perfectly satisfactory to the States and bring to an early conclusion the harassing difficulties attending the execution of the swamp-land act.

Upon this latter point I should like the expression of your views, based upon a more thorough knowledge of all the details of your office with which it may be connected, either before or after a consultation with the Governor of Illinois on the subject, my present inclination being towards a project which will fix a definite period beyond which (except in extensive frauds or very special cases) no further objections will be heard; that prior to that time free access should be had by all to full information as to what land had been

selected; that all objections be made under oath by persons whose credibility, etc., is fully vouched for, and after the expiration of the time fixed as above a day be appointed for the hearing of testimony in all the cases in any one county and the determination thereof to be final.

Be pleased to convey to the parties interested the result of this action on the general questions, and at as early a period as
98 possible carry out to completion the point yet left for future consideration.

Respectfully, your ob't servant,

R. W. McCLELLAND, *Sec'y.*

To Hon. Thos. A. Hendricks, Com'r of the Gen. Land Office.

To which plaintiff objected, but the court overruled the objection, and plaintiff excepted.

It was admitted by the plaintiff, who objected to the deed as immaterial, that William B. Egan, in April, 1854, executed and acknowledged and delivered to Henry S. Monroe a proper deed of conveyance of the land described in said certificate conveying the same to said Henry S. Monroe, which deed was duly recorded in January, 1855, which deed and record of the same having been destroyed by fire, and the plaintiff objected to the relevancy of such evidence; which objection the court overruled, and the plaintiff excepted.

It was further admitted by the plaintiff, who objected to the deed as immaterial, that May 11, 1871, Henry S. Monroe executed, acknowledged, and delivered to James H. Bowen a deed in due form conveying the land in suit, in consideration of $1,000, to said James H. Bowen, which deed was recorded in the recorder's office of Cook county aforesaid on the — day of May, 1871, in Book 584, p. 617.

The plaintiff objected to the said deed as immaterial, but the
99 court overruled the objection, to which the plaintiff excepted.

The parties stipulated that John W. Bunn entered said land in controversy by a certificate from the United States register and receiver at Springfield, Illinois, numbered 29521, dated May 24, 1870, and that it was assigned by him to James H. Bowen October 3rd, 1870; to which certificate and its assignment the plaintiff objected, and the court overruled such objection, and the plaintiff excepted.

The plaintiff then offered in evidence a United States patent to James H. Bowen as assignee of John W. Bunn, dated November 16th, 1870, and recorded in the recorder's office of said Cook county on the 16th day of July, A. D. 1873, in Book 499, p. 608; to the introduction of which evidence the plaintiff objected as immaterial; which objection the court overruled and permitted the patent to be read in evidence; to which ruling the plaintiff excepted. The defendant read said patent in evidence in words and figures as follows:

UNITED STATES OF AMERICA:

Certificate No. 29521.

To all — whom these presents shall come, Greeting:

Whereas James H. Bowen, assignee of John W. Bunn, has deposited in the General Land Office of the United States a certificate of the register of the land office at Springfield, Illinois, whereby it appears that full payment has been made by the said John W. Bunn, according to the provision of the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of public lands," for the southwest fractional quarter (north of Indian boundary line) of section seven, in township thirty-seven north of range fifteen east of the third principal meridian, in the district of lands subject to sale at Springfield, Illinois, containing forty-six acres and forty-eight hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said John W. Bunn:

Now, know ye that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said James H. Bowen and to his heirs the said tract above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said James H. Bowen and to his heirs and assigns forever.

In testimony whereof I, Ulysses S. Grant, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fifteenth day of November, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States the ninety-fifth.

By the President:

U. S. GRANT,
By J. PARRISH, *Secretary.*
I. N. GRANGER,
Recorder of the General Land Office.

Recorded, vol. 57, page 379.

The defendant offered in evidence a deed properly executed and acknowledged by James H. Bowen to the defendant, dated January 1st, 1872, and duly recorded June 21, 1872, conveying the land in controversy to the defendant; to which deed the plaintiff objected as immaterial, but the court overruled the objection and permitted the same to be read in evidence; to which ruling the plaintiff excepted. Said deed was in words and figures as follows:

This indenture, made this first day of January, in the year of our Lord one thousand eight hundred and seventy-two, between James

H. Bowen and Caroline A. Bowen, of the city of Chicago and State of Illinois, party of the first part, and the Calumet and Chicago Canal and Dock Company of the city of Chicago, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of three thousand dollars ($3,000) in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged and the said party of the second part forever released and discharged therefrom, has remised, released, sold, conveyed, and quit-
102 claimed, and by these presents do remise, release, sell, convey, and quitclaim, unto the said party of the second part, heirs and assigns forever, all the right, title, interest, claim, and demand which the said party of the first part has in and to the following-described lot, piece, or parcel of land, to wit:

The southwest fractional quarter, north of the Indian boundary line, of section seven (7), township thirty-seven (37) north of range fifteen (15), in the county of Cook and State of Illinois.

[Stamp, $3.]

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, heirs and assigns forever.

And the said James H. Bowen and Caroline A. Bowen, party of the first part, hereby expressly waive and release any and all right, benefit, privilege, advantage, and exemption under or by virtue of any and all statutes of the State of Illinois providing for the exemption of homesteads from sale on execution or otherwise, and especially under the act entitled "An act to exempt homesteads from sale on execution," passed by the General Assembly of the State of Illinois A. D. 1851, and approved February 11, 1851, and an act entitled "An act to amend an act entitled 'An act to exempt
103 homesteads from sale on execution,'" passed by said Assembly A. D. 1857, and approved February 17, A. D. 1857.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JAMES H. BOWEN. [SEAL.]
CAROLINE A. BOWEN. [SEAL.]

Signed, sealed, and delivered in presence of—

——— ———.

STATE OF ILLINOIS, }
Cook County, Town of Hyde Park, } ss:

I, Henry T. Chase, a notary public in and for the town of Hyde Park, in said county, in the State aforesaid, do hereby certify that James H. Bowen and Caroline A. Bowen, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing deed, appeared before me this day in person

and acknowledged that they signed, sealed, and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

And the said Caroline A. Bowen, wife of the said James H. Bowen, having been by me examined separately and apart and out of hearing of her husband, and the contents and meaning of the said instrument of writing having been by my fully made known and explained to her, and she also by me being fully informed
104 of her rights under the homestead laws of this State, acknowledged that she had freely and voluntarily executed the same and relinquished her dower to the lands and tenements therein mentioned, and also all her rights and advantages under and by virtue of all the laws of this State relating to the exemption of homesteads, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this 12th day of January, A. D. 1872.

HENRY T. CHASE,
Notary Public.

JAMES NOCQUET, being duly sworn, testified as follows:

I am chief draftsman of the Illinois Central Railroad Company, and have been in their employ since 1850. I am acquainted with the land in question.

Q. State whether or not the Illinois Central Railroad Company is located within six miles of the land in question; and, if so, where it was located.

To which question the plaintiff objected on the ground that it was irrelevant and immaterial; which objection the court overruled; to which ruling the plaintiff excepted.

A. This land is about two miles from the I. C. R. R. as it is now located and as it was located in 1851 or '52.

It was admitted that this land, together with other lands, was subdivided and platted into blocks and lots by the defendant
105 on June 29th, 1875, in accordance with the provisions of the statute of the State of Illinois then in force, and duly recorded in the recorder's office of Cook county, and that streets and alleys were upon said plat laid out across the land in said suit, and that the lines of said streets and of said blocks and lots were staked out on said land by defendant.

Fences that were upon this land in suit and a house placed on the land prior to such subdivision were then removed by defendant and some work done by the defendant by way of grading upon Torrence avenue.

The defendant offered in evidence a tabulated statement of taxes paid by it upon the property in question, and all formal objections as to such evidence and the production of the tax receipts was waived by the plaintiff; but the plaintiff objected — the relevancy and sufficiency of such evidence because it did not bring itself within

any section of the limitation laws concerning the payment of taxes, and also objected to the showing by the defendant of the payment of any taxes since the commencement of this suit; but the court overruled such objections; to which ruling the defendant excepted, and said statement was read in evidence in words and figures as follows:

Abstract of Taxes for the Years 1870 *to* 1886, *Inclusive, on — North of Indian Boundary Line, Fractional Southwest* ¼, *Section* 7, *Township* 37, *Range* 15, *Identical with Blocks* 156 *to* 161, 170 *to* 174, *and* 177, 178, *and* 179, *in South Chicago.*

106

Year.	State tax.	County tax.	Town & village tax.	School tax.	Park tax.	South Park ass'm't.	Totals.	Date of payment by C. & C. C. & D. Co.
	dols. cts.	*dols. cts.*	*dols. cts.*	*dols. cts.*	*dols. cts.*	*dols. cts.*	*dols. cts.*	
1870	4 40	10 80	4 96	21 60	....	.....	41 76	Apr. 29, 1871.
1871	9 43	16 73	20 99	16 73	3 32	.....	67 20	M'ch 10, 1873.
1872	8 79	14 64	23 42	11 71	7 44	17 96	83 96	Sept. 4, 1873.
1873	13 92	19 90	27 70	23 38	9 80	10 24	104 94	Oct. 7, 1874.
1874	23 79	39 64	54 46	70 36	18 73	10 24	222 22	Aug. 25, 1875.
1875	14 55	32 00	53 32	68 83	12 12	10 24	191 06	
						13 57		

Forfeited September 22, 1876, and added to 1876. Sold Nov. 9, 1876, to R. W. Bridge for 15.58. Redeemed and cancelled Feb'y 27, 1878.

1876	13 83	25 15	65 88	85 30	6 55	10 24	206 95	Oct. 31, 1877.
1875	16 01	35 20	58 66	75 72	13 34	.....	170 92	Oct. 31, 1877.

Sold Sept. 2, 1878, to R. W. Bridge. Redeemed and cancelled March 21, 1879, as to South Park assessment of 1876.

1877.—I find on page 209, Book 7 of Collector's Warrants, a memorandum as follows: "The balance of this subdivision not assessed for the taxes of 1877, being blocks 113 to 209, inclusive. No assessment in assessor's book.

1878	14 82	38 38	96 22	69 16	16 00	10 24	244 82	Aug. 23, 1880.
1879	7 04	25 53	72 56	102 82	11 96	10 24	230 15	M'ch 12, 1880.
1880	30 04	70 34	188 99	294 37	31 25	.....	614 99	Feb'y 19, 1881.
1881	38 42	52 64	173 58	332 76	33 81	....	631 21	Jan. 13, 1882.
1882	49 57	117 00	248 04	366 89	49 56	....	831 06	Feby. 7, 1883.
1883	61 07	147 12	442 26	758 20	49 79	.....	1,458 44	Dec. 8, 1883.
1884	44 20	113 51	182 62	489 67	38 04	.....	868 04	Dec. 30, 1884.
1885	65 90	121 19	275 45	488 33	59 02	.....	1,009 89	Dec. 31, 1885.
1886	445 12	122 99	267 92	469 95	60 21	.....	965 79	Dec. 24, 1886.
	444 69	967 56	2,205 37	3,670 06	427 60	89 64	7,804 92	

107–109 It is stipulated and agreed that the property in question as described in the declaration or as described as subdivided into lots and blocks was never assessed for taxes for the year 1877.

HENRY S. MONROE testified: "I purchased this property from Egan for attorney's fees. I never took possession of it. I do not know whether I ever paid any taxes on it or not."

* * * * * * *

110–113 JAMES MARSH, of lawful age, being duly sworn, testified that he had been secretary and treasurer of the defendant for two years; is well acquainted with the property in question and its value; it is worth to-day $1,000 per acre.

* * * * * * *

114 H. W. HARMON, being duly sworn, testified:

I am forty years of age; reside in Hyde Park, and am secretary of the South Park commission and have been for several

years past. The fractional southwest quarter of section seven (7), township thirty-seven (37) north of range 15 east of the third principal meridian and north of the Indian boundary line, was sold for the fourth installment of the South Park special assessment to R. W. Bridge on Nov. 9th, 1876, and said Bridge paid the fifth installment of said South Park special assessment on the 14th of August, 1877. Bridge sold his certificate of sale for said 4th installment and paid for said fifth installment by the defendant on the ninth of November, 1877. Said property was also sold to said Bridge for the installment of said South Park special assessment on September
115 2nd, 1878, and he assigned said certificate to the defendant on the 19th of March, 1879. By redemption or assignments all of said sales and certificates have been taken up and cancelled by the defendant.

* * * * * * *

116 And this was all the evidence in the case upon either side, and the court, after hearing the arguments of counsel, took the cause under advisement, and afterwards, by agreement of counsel, and on Jan. 28, 1888, either side presented to the court propositions to be held as law by the court. Thereupon the plaintiff requested the court to hold the following propositions of law, filed by it January 28, 1888:

In the Circuit Court of Cook County.

THE COUNTY OF COOK, Plaintiff,
vs.
THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY, Defendant.

117 The plaintiff in the above-entitled cause submits the court the following propositions to be held as law:

* * * * * * *

IV.

The lists of lands, including the tract of land in question, transmitted to the Governor of Illinois under the act of Congress of September 28th, 1850, by the Secretary of the Interior, a copy of which, duly certified by the State auditor, has been introduced in evidence, is sufficient evidence in this action to show *prima facie* title to the tract in question in the plaintiff under law.

[Written across the face:] Held.

118 V.

If the evidence shows that the land in question was listed as swamp land, and so certified by the Secretary of the Interior to the Governor of the State of Illinois, then the effect of such listing and certification was to vest the title thereto in the State of Illinois on

the 28th of September, 1850, irrespective of the question whether said tract was situate within six miles of the line of the Illinois Central railroad as located or not.

[Written across the face:] Held.

VI.

As a matter of law, the fact that the premises in question were part of an odd-numbered section and lying within six miles of the line of the Illinois Central railroad as finally located would not prevent the title thereto passing to the State of Illinois under the swamp-land act of Congress of September 28th, 1850, if it were in fact swamp and overflowed land within the meaning of that act at that date.

[Written across the face:] Held.

VII.

If the land in question had in fact been selected as swamp and overflowed land under the swamp-land act, approved September 28th, 1850, by the surveyor general of the United States for the States of Missouri and Illinois, and said tract was reported as such swamp land by said surveyor to the Commissioner of the General Land Office on October 29th, 1853, and if the evidence shows that the same remained vacant and unappropriated and not interfered with by an actual settlement under any existing law of the United
119 States on the 3rd day of March, 1857, then the title to said tract of land was confirmed in the State of Illinois by the act of Congress approved March 3rd, 1857, entitled "An act to confirm to the several States the swamp and overflowed lands selected under the act of September 28th, 1850, and the act of the 2nd of March, 1849."

[Written across the face:] Held.

VIII.

If the land in question was in fact swamp land on the 28th day September, 1850, the day of the passage of the swamp-land grant, then the title passed to the State by virtue of said act irrespective of any acts of the officers of the Department of the Interior of the United States and irrespective of any subsequent confirmatory acts of Congress.

[Written across the face:] Held.

IX.

The land in question having been certified as swamp land by the surveyor general of the United States for the States of Missouri and Illinois, such certificate is conclusive that the same is swamp land, and it was incompetent for the court to admit evidence tending to show that the land was not in fact swamp land.

[Written across the face:] Refused.

X.

Under the evidence in this cause the title to the land in controversy, it being swamp land, passed by the grant of September 28th, 1850, known as the swamp-land act, to the State of Illinois and the title to the said land vested in the plaintiff, The County of Cook, by virtue of the act of the General Assembly of Illinois en-
120 titled "An act to dispose of the swamp and overflowed lands and to pay the expenses of selecting and surveying the same," approved June 22nd, 1852, without the execution of any deed therefor.

[Written across the face:] Held.

XI.

In Illinois an action of ejectment must be determined by the legal title alone, and equitable defenses, if any exist, cannot be interposed as a defense.

[Written across the face:] Refused.

XII.

The evidence shows that the defendant or its grantor had possession of the land in controversy in 1870 by the erection of a dwelling-house upon the land and enclosing it with a board fence; and the evidence further shows that the defendant left the land vacant and unoccupied in 1875 by removing the house and the fence; and the suit having been commenced January 31st, 1883, no question of law concerning the payment of taxes could arise in this case.

[Written across the face:] Refused. No title under the statute of limitations has been made out in this case.

XIII.

The payments of taxes since the commencement of this suit are not proper evidence for any purpose in this case.

[Written across the face:] Refused.

XIV.

The mere collection and payment of taxes under the township organization laws of Illinois does not work an estoppel to an action of ejectment for lands so taxed.

[Written across the face:] Held.

XV.

121 The cancellation of the Egan entry August 10th, 1855, by the Department of the Interior of the United States, in the absence of any facts or evidence showing the circumstances which led to its cancellation, must be presumed to have been based upon sufficient facts to authorize it.

[Written across the face:] Refused.

XVI.

The finding and judgment of the court in this cause upon the evidence and law should be that the plaintiff is the owner in fee of the land described in the declaration.

[Written across the face:] Refused.

And the court held those marked "held" and refused those marked "refused;" to which refusal of plaintiff's propositions of law marked respectively 1, 2, 9, 11, 12, 13, 15, and 16 the plaintiff excepted to the ruling of the court in refusing to hold said propositions as law, and the action of the court in adding to the plaintiff's 12th request the words: "No title under the statute of limitations has been made out in this cause;" and thereupon and therefore marking the said 12th request refused, the plaintiff at the time excepted; and defendant excepted to the action of the court on plaintiff's request marked "held;" and thereupon the defendant asked the court to hold the following propositions as law:

In the Circuit Court of Cook County.

THE COUNTY OF COOK, Plaintiff,
vs.
CALUMET AND CHICAGO CANAL AND DOCK COMPANY, Defendant.
} Ejectment.

122 The defendant in the above-entitled cause submits to the court the following propositions to be held as law:

I.

That the land in controversy in this case and described in the plaintiff's declaration did not pass to the State of Illinois under the swamp-land act of September 28th, 1850.

[Written across the face:] Refused.

II.

That the entry of said land by William B. Egan on October 20th, 1853, and the receipt and retention by the United States of the money and warrant delivered by said Egan in payment therefor was a sale by the United States of said land to said Egan and an appropriation of said land by the United States within the intent and meaning of the confirmatory acts of Congress.

[Written across the face:] Held.

III.

That said William B. Egan was the owner in said lands in fee, and that the defendant in this case, as assignee of said Egan by regular conveyances, made prior to the commencement of this suit, was at

the time of the commencement of this suit the owner of said land in fee and entitled to the possession thereof.

[Written across the face:] Held.

IV.

That under the act of the Legislature of Illinois of June 22nd, 1852, in relation to swamp lands, and under the act amendatory thereof, of the Legislature of said State, of March 4th, 1854, the county of Cook could not become the owner of said land as
123 against said Egan or his grantees until said county of Cook should comply with the requirements of said acts as to purchasers of swamp land from the United States subsequent to the enactment of the swamp-land act of September 28th, 1850, and that the burden was upon said County of Cook, plaintiff herein, to prove affirmatively such compliance.

[Written across the face:] Held.

V.

That the State of Illinois, by legislative enactments and by the acts of its proper authorities, adopted and ratified the confirmatory acts of the Congress of the United States and the provisions thereof made for the benefit of purchasers of swamp land from the United States subsequent to the act of September 28th, 1850, and the county of Cook is bound thereby.

[Written across the face:] Refused.

VI.

That the acquiescence of the county of Cook in title and possession of the defendant herein and its grantors for thirty years, as shown by the evidence herein, is a bar to the prosecution of this action.

[Written across the face:] Refused. Acquiescence alone not a bar.

VII.

That it was incumbent upon the plaintiff, upon the facts upon which it bases its claim of title, to have shown affirmatively and by the clear preponderance of the testimony that the land in question was in fact swamp and overflowed land within the meaning of the swamp-land act of September 28th, 1850, on the said 28th day of Sept., 1850, and that the plaintiff, not having so proven, cannot recover in this case.

[Written across the face:] Refused.

124-142 VIII.

That the county of Cook cannot recover in this cause, because no no demand for the possession of said premises is shown ever to have been made upon the said defendant or any of its grantors.

[Written across the face:] Refused.

IX.

That the county of Cook is estopped by its acts, seeking indemnity for said lands of the United States, from claiming title to itself in said land.

[Written across the face:] Refused.

X.

That, under the law, upon the facts shown upon the trial, the plaintiff cannot recover herein.

[Written across the face:] Held.

CHAS. M. OSBORN,
JOHN B. COHRS,
Def't's Att'ys.

And such propositions as are marked "held" the court held as law, and such propositions as are marked "refused" the court refused to hold as law; and the plaintiff excepted to the ruling of the court in holding said propositions to be law for said defendants, and defendant excepted to the action of the court as to those of its requests marked "refused;" and thereupon the court rendered the following opinion in words as follows:

* * * * * * *

143 And the court found for defendant.

Thereupon the plaintiff made a motion for a new trial in said cause, and filed the same in writing January 28, 1888.

STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Circuit Court of Cook County. January Term, A. D. 1888.

COUNTY OF COOK
vs.
CALUMET AND CHICAGO CANAL AND DOCK COMPANY.

And now comes the plaintiff, by its attorneys, and moves the court for a new trial herein—

1st. Because the finding of the circuit court is contrary to the law.

2nd. Because the findings of the court is contrary to the evidence.

3d. Because the court erred in refusing to hold the plaintiff's propositions of law marked refused.

4th. Because the court erred in refusing the 12th proposition of law asked by the plaintiff for the reason given by him, that
144 "no title under the statute of limitations has been made out in this case."

5th. Because the judgment of the court is contrary to his findings of the law and the facts.

6th. The court erred in holding each of the propositions of law for the defendant marked given.

7th. The court by its findings and judgment denied to the plaintiff its rights under the act of Congress of September 28, 1850, commonly called the swamp-land grant.

E. R. BLISS,
Att'y for the County of Cook.

CHARLES H. WOOD AND
CONSIDER H. WILLETT, *Of Counsel.*

That afterwards, on the 1st day of February, 1880, said motion for a new trial was overruled by the court and judgment entered upon the findings for the defendant and judgment for cost against the plaintiff. To the overruling of said motion for a new trial and to the entry of such judgment the plaintiff then and there excepted.

The foregoing covers all the testimony that was offered or given in evidence on the trial of said cause by either party. And inasmuch as the matters aforesaid do not appear of record this bill of exceptions is presented to the court to be signed and sealed, and it is accordingly done this 27th day of February, A. D. 1888.

A. N. WATERMAN, [SEAL.]
Judge of the Circuit Court of Cook County, Ill.

145 STATE OF ILLINOIS, } *ss:*
County of Cook, }

In the Circuit Court.

THE COUNTY OF COOK, Plaintiff,
vs.
THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY, Defendant. } In Ejectment. 43690.

Precipe for Record.

To Henry Best, clerk of circuit court of Cook county:

The clerk in making up the record in said cause for the supreme court, at the June term, A. D. 1888, may omit all orders entered in said cause before the Hon. Kirk Hawes and before the Hon. John G. Rogers, except those entered in said cause February 15, 1886, and March 1st, 1886, and orders entered before the Hon. Lorin C. Collins on January 25th, 1887; April 4th, 1887; April 16th, 1887, and April 23rd, 1887, and before the Hon. A. N. Waterman Oct. 6th, 1887; January 28th, 1888; February 1st, 1888, and February 27th, 1888—

The orders omitted from said record being entirely irrelevant to the merits of any controversy involved in the same.

CONSIDER H. WILLETT AND
CHARLES H. WOOD,
Pl'ff's Att'ys.
JOHN B. COHRS, *Def't's Att'y.*

146 STATE OF ILLINOIS, } ss:
Cook County, }

I, Henry Best, clerk of the circuit court of Cook county and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record according to precipe filed and heretofore copied in this record in a certain cause lately pending in said court, on the common-law side thereof, between Cook County, plaintiff, and Calumet and Chicago Canal and Dock Company, defendant.

In witness whereof I have hereunto set my hand and
[L. S.] affixed the seal of said court, at Chicago, in said county, this 10th day of May, 1888.

HENRY BEST, *Clerk.*

STATE OF ILLINOIS, } ss:
Central Grand Division, }

In the Supreme Court, to the June Term, 1888.

COUNTY OF COOK, Appellant,
vs.
THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY, Appellee.
} Appeal from Cook County. Assignment of Errors.

147 And now comes the County of Cook, appellant, by E. R. Bliss, county attorney, and Consider H. Willett and Charles H. Wood, its attorneys, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The circuit court erred in entering a judgment against the plaintiff and in favor of the defendant.

2d. The judgment of the circuit court is against the law and the evidence.

3rd. The circuit court erred in holding the defendant's propositions of law.

4th. The circuit court erred in refusing and modifying the plaintiff's propositions of law.

5th. The circuit court had no jurisdiction to try this case and erred in assuming to exercise such jurisdiction.

6th. The circuit court erred in refusing to retax costs and in granting a motion for a new trial.

7th. The circuit court erred in refusing to grant a new trial.

By reason whereof the plaintiff in error prays that said judgment may be reversed.

E. R. BLISS,
County Attorney.

CONSIDER H. WILLETT,
CHARLES H. WOOD,
Of Counsel.

148 Be it remembered that afterwards, on the sixth day of June, in the year of our Lord one thousand eight hundred and eighty-eight, an order was made by said supreme court, which was in words and figures following, to wit:

COUNTY OF COOK
vs.
CALUMET & CHICAGO CANAL AND DOCK COMPANY. } Appeal from Cook.

On this day comes the appellant herein, by attorney, and moves the court to set said cause for oral argument on Tuesday next; and the court, not being sufficiently advised in the premises, takes said motion under advisement.

And be it further remembered that afterwards, to wit, on the seventh day of June, in the year of our Lord one thousand eight hundred and eighty-eight, an order was made by said supreme court, which is in words and figures following, to wit:

COUNTY OF COOK
vs.
CALUMET & CHICAGO CANAL AND DOCK COMPANY. } Appeal from Cook.

On this day come again the parties herein, by attorney, and, the court being now sufficiently advised in the premises, it is ordered by the court that the motion heretofore made to set said cause for oral argument be and the same is allowed.

149–156 And be it further remembered that afterwards, to wit, on the twelfth day of June, in the year of our Lord one thousand eight hundred and eighty-eight, an order was made by said supreme court in words and figures following, to wit:

THE COUNTY OF COOK
vs.
CALUMET AND CHICAGO CANAL AND DOCK COMPANY. } Appeal from Cook.

On this day come the said parties, by their attorneys, and this being one of the days set apart for the call of the docket under the rules or orders of the court for this term, and this cause coming now on to be heard, the appellant having entered motion to reverse the judgment and remand said cause and for costs, and the appellee having entered motion to affirm the judgment herein and for costs and for *procedendo*, and said motions being taken under advisement for final hearing, and the clerk reporting to the court that said cause is now ready to be taken on the call of the docket, it is ordered by the court that this cause be now submitted upon the record, abstracts, briefs, and arguments filed and to be filed herein under the rules or order of the cort; and it is further ordered by the court that this cause be now taken under advisement for final hearing.

* * * * * * *

157 At a supreme court begun and held at Springfield on the first Tuesday in the month of January, in the year of our Lord one thousand eight hundred and eighty-nine, the same being

the first day in January, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: Alfred M. Craig, chief justice; John Scholfield, justice; Simeon P. Shope, justice; David J. Baker, justice; Benj. D. Magruder, justice; Joseph M. Bailey, justice; Jacob W. Wilkin, justice.

And be it further remembered that afterwards, to wit, on the seventh day of January, in the year of our Lord one thousand eight hundred and eighty-nine, an order was made by said court in words and figures following, to wit:

THE COUNTY OF COOK
vs.
THE CALUMET & CHICAGO CANAL AND DOCK COMPANY. } Petition for Rehearing.

On this day come again the parties herein, and, the court being now sufficiently advised in the premises, it is ordered by the court that the order heretofore entered in said cause on the fourteenth day of November, A. D. 1888, reversing the judgment of the
158 circuit court of Cook county and remanding said cause be set aside, annulled, and wholly for nothing esteemed, and all proceedings under said order are hereby stayed and a new trial of said cause is hereby awarded.

And be it further remembered that on, to wit, the nineteenth day of January, in the year of our Lord one thousand eight hundred and eighty-nine, by leave of court an additional record was filed in said cause; which said additional record was in words and figures as follows, to wit:

Be it remembered that at the term aforesaid, to wit, on the 9th day of March, A. D. 1886, there was filed in said court a certain appeal bond, which is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, the Calumet and Chicago Canal and Dock Company and John B. Cohrs, of the county of Cook and State of Illinois, are held and firmly bound unto the County of Cook, also of the same county and State, in the penal sum of two hundred ($200.00) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 5th day of March, A. D. 1886.

The condition of the above obligation is such that whereas
159 the said County of Cook did, on the first day of March, A. D. 1886, in the circuit court of Cook county, in the State aforesaid, and of the — term thereof, A. D. 1886, recover a judgment against the above-bounden Calumet and Chicago Canal and Dock Company for the possession in fee of S. W. frac. ¼ sec. 7, T. 39 N.,

R. 15 E., 3rd P. M., north of Indian boundary line, except that part occupied by the Irondale Branch of C. & R. I. R. R., besides costs of suit; from which said judgment of said circuit court of Cook county the said Calumet and Chicago Canal and Dock Company has prayed for and obtained an appeal to the supreme court of said State:

Now, therefore, if the said Calumet and Chicago Canal and Dock Company shall duly prosecute its appeal with effect and, moreover, pay the amount of the judgment, costs, interest, and damages rendered and to be rendered against it in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and virtue.

CALUMET AND CHICAGO CANAL AND DOCK COMPANY,
[SEAL.] By JOHN B. COHRS, *Vice-President.*
JOHN B. COHRS. [SEAL.]

Taken and entered into before me, at my office, the 9th day of March, A. D. 1886.

HENRY BEST, *Clerk.*

Bond O K.
C. H. WILLETT, *P't's Att'y.*

Attest: JAMES MARSH,
Sec. C. & C. C. & D. Co.

160 STATE OF ILLINOIS, } *ss:*
Cook County, }

I, Henry Best, clerk of the circuit court of Cook county and the keeper of records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of a certain appeal bond filed in said court on the 9th day of March, A. D. 1886, in a certain cause lately pending in said court, on the common-law side thereof, between County of Cook, plaintiff, and Calumet and Chicago Canal and Dock Company, defendant.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Chicago, in said county, this 14th day of January, 1889.

HENRY BEST, *Clerk.*

And be it further remembered that afterwards, to wit, on the eighteenth day of January, in the year of our Lord one thousand eight hundred and ninety, an opinion was filed in said court; which said opinion was in words and figures following, to wit:

THE COUNTY OF COOK
vs.
THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY.

CRAIG, *J.:*

161 This was an action of ejectment brought by Cook County against the Calumet and Chicago Canal and Dock Company

to recover the southwest quarter of section 7, town. 37 north, range 15 east, of the third principal meridian, except 46.46 acres. A trial was had before the court without a jury, and judgment was rendered March 1, 1886, for the plaintiff.

On the 16th day of September, 1886, the agent of the defendant paid to the attorney of the plaintiff a certain amount of money, which was supposed to be the amount of costs in the case, and the attorney gave the defendant a statement in writing as follows:

"The costs in this suit have this day been fully paid by defendant herein, and the clerk of the circuit court is hereby authorized to give said defendant a certificate of satisfaction therefor.

"September 16, 1886."

Upon the presentation of the above paper to the clerk of the circuit court that officer executed and delivered to the defendant a paper which read as follows:

"COUNTY OF COOK *vs.* THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY.	Eject. No. 43690.

This is to certify that on the 16th day of September, A. D. 1886, all costs herein were paid in full to said date, and that no costs have since then accrued herein.

Dated this 21st day of January, A. D. 1887.

HENRY BEST, *Clerk.*"

162 On the 5th day of January, 1887, on motion of the defendant, the circuit court granted a new trial in said cause under the statute. The order entered by the court was as follows: "It appearing to the court that said defendant has paid all the costs that have accrued in said cause to date, therefore, on its motion, by its attorneys, it — ordered that a new trial of the cause be, and the same is hereby, granted in pursuance of the statute in such cases made and provided." No bill of exceptions was prepared or executed to preserve the evidence heard by the court upon the hearing of this motion, upon which its finding was predicated, or to preserve any exceptions to the judgment entered. No steps whatever were taken to set aside this judgment during the January term of court, at which it was rendered, but on the 16th day of April, 1887, after the expiration of the year in which the defendant was entitled to a new trial, the plaintiff entered a motion to set aside the judgment granting a new trial on the alleged ground that all the costs which had accrued in the cause were not in fact paid. This motion the court overruled, and upon a trial upon the merits judgment was rendered in favor of the defendant. The plaintiff excepted to the ruling of the court on the motion to vacate the judgment granting a new trial, and the decision upon that question we will first consider before passing to the judgment of the court on the merits of the case.

On the motion to set aside the judgment granting a new trial

affidavits in regard to the amount of the costs and the
163 payment were read to the court, and these affidavits have been preserved in a bill of exceptions; but in the view we take of the question it will be necessary to determine whether this evidence shows that all the costs were actually paid or not.

On the 25th day of January, 1887, when the circuit court heard the evidence and granted a new trial, it had jurisdiction of the parties and subject-matter, and the general rule is that a judgment of a court of general jurisdiction, when it has jurisdiction of the person and of the subject-matter, is conclusive and cannot be attacked in a collateral proceeding. Here the judgment granting a new trial was rendered at the January term, 1887. No exception was taken to it, no appeal was taken from it, no writ of error was sued out to reverse it, nor was any motion made to set it aside during the term at which it was rendered, and the question presented is whether the circuit court had jurisdiction at a subsequent term to entertain a motion to vacate and set aside that judgment. We think the law is well settled that the court had no jurisdiction at a subsequent term to vacate the judgment or change it in any substantial manner. As early as 1860 this court held, in Cook *vs.* Wood, 24 Ill., 295, "that after a term has expired a court has no discretion or authority at a subsequent term to set aside a judgment, but may amend it in mere matter of form after notice has been given to the opposite party." This decision has been followed in numerous cases, and the rule announced may be regarded as the settled
164 law of the State. National Ins. Co. *vs.* Chamber of Commerce, 69 Ill., 22; Coursen *vs.* Hixon, 78 *id.*, 339; Baker *vs.* Palmer, 83 *id.*, 568; McKindley *vs.* Buck, 43 *id.*, 488; State Savings Institution *vs.* Nelson, 49 *id.*, 171; Smith *vs.* Wilson, 26 *id.*, 186.

The fact that the judgment involved was entered in an action of ejectment and was one granting a new trial does not affect the question. The court, as appears from the judgment itself, heard the evidence, and from the evidence produced adjudged and determined that a new trial should be granted. The judgment rendered upon the evidence submitted to the court was not conditional or interlocutory or a mere ruling or decision, such as a court may make on a question of pleading or evidence during the progress of a trial, but it was a final determination of a right conferred by the statute, which right had to be determined upon evidence introduced before the court, and no reason is perceived why a judgment of this character should not be as binding and conclusive and be treated in the same manner as a final judgment rendered in an action of assumpsit or in an action for tort upon evidence submitted to the court.

In Oetgen *vs.* Ross, 36 Ill., 337, where the question arose as to the power of the court to set aside a judgment by default in an action of ejectment after the close of the term, it is said: "It is urged by the counsel for the appellants that the setting aside a judgment by default is discretionary and not the subject-matter of
165 & 166 review in this court. This is true as a general rule,

but not true when the question turns upon the jurisdiction of the court to make the order."

It has been decided in this court, in an extremely well-considered case (Cook *vs.* Wood, 24 Ill., 297), that the circuit court has no power to set aside a judgment by default rendered at a previous term, and the second judgment rendered and the judgment setting aside the default were both reversed and the case ordered to stand upon the first judgment. In the case before us the order setting aside the default was not made until more than a year after the original judgment, a term having intervened, and, so far as depended on the common-law powers of the court, that order was a nullity. This decision has an important bearing on two aspects of the case under consideration—first, in holding that a judgment cannot be vacated after the close of the term at which it is rendered; and, second, in holding that a judgment granting a new trial in an action of ejectment is a final judgment, subject to review on appeal or writ of error. In Becker *vs.* Sauter, 89 Ill., 597, the same question involved in this record arose, and we there held that a judgment granting a new trial in an action of ejectment could not be set aside or vacated on motion at a subsequent term.

Reliance is, however, placed on Setzke *vs.* Setzke, 121 Ill., 30. That case is not in conflict with Becker *vs.* Sauter, *supra*. There was no hearing of testimony in Setzke *vs.* Setzke on a motion for a new trial and a finding on the evidence that the costs had been
167 paid, followed by a formal judgment granting a new trial. If there had been the judgment, after the close of the term at which it was rendered, would have been conclusive; but the order granting a new trial was conditional upon the payment of costs within the year allowed by the statute. The costs never having been paid, no new trial was in fact ever granted. We do not think the case cited has any bearing on the question involved in this case. If the plaintiff was dissatisfied with the judgment entered by the court granting a new trial and desired to have the judgment reviewed, the only way that object could be accomplished would have been to preserve the evidence heard by the court by bill of exceptions, and then, after a final disposition of the cause, that question, with all others, could be reviewed on appeal or writ of error, as was done in Oetgen *vs.* Ross, *supra*. That, however, was not done in this case.

In Freeman on Judgments it is said: "When in an action to set aside a judgment the court grants the prayer of the complainant and awards a new trial the order setting aside the judgment is a final judgment. * * * The whole scope and object of the suit being to vacate the former judgment and to procure a new trial, and the issues all being made up for that purpose, their determination necessarily puts an end to the suit." In Belt *vs.* Davis, 1 Cal., 134, it was held: "By a final judgment is to be understood not a final determination of the rights of the parties in the subject-matter of the litigation, but merely of the particular suit." The prin-
168 ciple announced is applicable here. When the — rendered

a judgment granting a new trial such judgment was a final determination of the issues involved in the application.

The plaintiff, The County of Cook, claims title in fee to the land in controversy under what is known as the swamp-land legislation. Under the act of Congress enacted September 28th, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," followed by an act of March 2, 1855, entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," and an act of March 3, 1857, entitled "An act to confirm to the several States the swamp and overflowed lands selected under the act of September 28, 1850, and the act of March 2, 1849," all of the swamp and overflowed lands in the State of Illinois were donated to the State. Under the act of the Legislature of the State in force June 22, 1852 (Laws of 1852, p. 178), and an act of March 4, 1854 (Laws of 1854, p. 19), all of the swamp and overflowed lands were donated by the State to the counties respectively. In connection with the acts of Congress and the acts of the Legislature the plaintiff introduced into evidence a certificate from the Commissioner of the General Land Office showing that the land in question had been selected as swamp land on the 29th day of October, 1853; also a certified copy of a list of swamp lands filed in the office of the State auditor, including the land in question.

169 Conceding that the evidence introduced by the plaintiff was sufficient to establish *prima facie* a title upon which a recovery might be had if no evidence had been introduced by the defendant, the defendant claims that the evidence introduced by it was sufficient to overcome the case made by the plaintiff and establish title in defendant. One defense relied upon was that the land in controversy was, by act of Congress approved September 20, 1850, granted to the State of Illinois for the construction of the Illinois Central railroad, but, in the view we take of the other evidence, it will not be necessary to consider this branch of the case.

The defendant introduced in evidence a certificate of the register and receiver of the United States land office at Chicago, Illinois, dated October 20, 1853, showing that William B. Egan entered the land on that date with a land warrant, number 2495, and — $1.25 per acre cash, the price of the land having been advanced to $2.50 per acre. William B. Egan conveyed to Henry S. Monroe in April, 1854, and Monroe conveyed to James H. Bowen in May, 1871, and Bowen conveyed to the defendant in May, 1874. The land was assessed for taxes, and the taxes were paid year after year by Bowen and the defendant. There was, however, no evidence of seven successive years' payment of taxes under color of title while the land was vacant or after possession was taken, so as to bring the defendant within the protection of the statute of limitations. It will be observed that the land was entered by Egan after the passage of the act of Congress granting swamp lands to the State; but the

170 entry was made nine days before the land was selected as swamp land, and in this connection it may be remarked that

the fact is well known to all who have given the subject any consideration that after the passage of the swamp-land act of 1850 the various land offices continued open and lands were sold by the United States which were subsequently claimed by the States under the provisions of the swamp act. This condition of things no doubt led to some of the legislation by Congress and the State of Illinois after the act of 1850, which will be referred to hereafter.

The first section of the act of 1850 provided that the whole of the swamp and overflowed lands made unfit thereby for cultivation which shall remain unsold at the passage of this act shall be, and the same are hereby, granted to the State of Arkansas. The third section provides that in making out a list and plats of the land all legal subdivisions the greater part of which is wet and unfit for cultivation shall be included in said list; but when the greater part of a subdivision is not of that character the whole of it shall be excluded therefrom. The fourth section extends the provisions of the act to all States where swamp and overflowed lands may be situated. Under this act of Congress, had there been no other legislation on the subject, if the greater part of the quarter section of land in question was wet and unfit for cultivation within the meaning of the swamp-land act, it is plain that the title to the land would have become vested in the State of Illinois.

171 After the passage of the act the Legislature of the State, on the 22nd of June, 1852, passed an act granting the swamp lands donated by the General Government to the State to the several counties in which such lands were located. The second section of the act provides as follows: "Whenever it shall appear that any of the lands granted to the State by the aforesaid act of Congress shall have been sold by the United States since the passage of this act it shall be lawful for the said counties to convey such lands to the purchasers thereof. The deeds of conveyance shall be made by the judges of the county court as such; * * * and on delivering said deed to the purchaser the county judges shall take from him an assignment of all his rights in the premises, and as such assignees they shall be authorized to receive from the United States the purchase-money of said land, and whenever any lands embraced by the said act have been located by bounty-land warrants since the passage thereof it shall be lawful for such county in which the same are situated to convey the same in manner aforesaid to the person or persons who located said warrant and to take an assignment of the same to them as county judges." The third section of the act directed the auditor to furnish each county with an abstract of the swamp lands which have been purchased from the United States or which have been located by land warrants or to which the right of pre-emption has attached since the passage of the swamp-land act.

172 This act was amended by another act, passed on the 4th day of March, 1854. The first section of the amendatory act provides that in all cases where any of the lands granted to the counties have been sold by the United States since the passage of the act of Congress of September 28, 1850, the county courts of the

several counties shall, by an order to be entered of record at any regular or special meeting for the transaction of county business, make all necessary orders for securing such purchasers since the passage of the swamp-land act of such swamp and overflowed lands. The act contains other sections calculated to protect persons in their titles who may have purchased swamp lands from the United States after the passage of the swamp-land act, but it will not be necessary to set out in full these sections here. See Laws of 1854, p. 19.

After the passage of the two acts by the Legislature of the State, Congress, doubtless with the same object in view—the protection of the titles of purchasers—on March 2, 1855, passed an act, the first section of which is as follows: "That the President of the United States cause patents to be issued as soon as practicable to the purchaser or purchasers, locator or locators, who have made entries of the public lands claimed as swamp lands, either with cash or with land warrants or with scrip, prior to the issue of patents to the State or States, as provided for by the second section of the act approved September 28th, 1850, entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' any decision of the Secretary of the Interior or other
173 officer of the Government of the United States to the contrary notwithstanding." Section two provided that upon due proof by the State that any of the lands purchased were swamp lands within the true intent and meaning of the act the purchase-money shall be paid over to the State in which the land was situated. See also act of Congress of March 3rd, 1857 (1 Lester's Land Laws). This act, in substance, declared that the selection of swamp and overflowed lands granted to the several States heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated and not interfered with by an actual settlement under any existing law of the United States, be, and the same are hereby, confirmed and shall be approved and patented to the several States: Provided, that nothing in this act shall interfere with the provisions of the act of March 2, 1855, for the relief of purchasers and locators of swamp and overflowed lands.

It is thus manifest from the legislation of Congress and the legislation of the State that it has always been the intention both of the General Government and of the State to protect the title of a purchaser of swamp lands. Congress, in making the grant to the State, had the right to impose such terms and conditions as it saw proper, and the State, in granting the lands to the counties, had the undoubted power to provide that purchasers who had bought and paid for the lands should be protected in their several purchases, as, in effect, it did. The county of Cook derived its title to the
174 land under and by virtue of the act of 1852, as amended in 1854, and if the acts do not pass the title to the land in question it is plain that Cook county could not recover. The first section of the act of 1852 is general in terms, granting all swamp lands which had been granted to the State to the respective counties, but section two qualifies section one and declares that whenever it shall

appear that any of the lands granted to the State shall have been sold it shall be lawful for said counties to convey such lands to the purchasers thereof. This was followed by an amendment, passed in 1854, requiring the county courts, by an order to be entered, to make all necessary orders for securing to purchasers of swamp lands their titles to such lands. Under this legislation it is manifest that the State of Illinois never intended to transfer to the counties lands that had been entered from the United States, but, on the other hand, the object was to protect the title of all purchasers. The language, "It shall be lawful for the said counties to convey," did not leave a discretion resting with the county to hold the land or convey, as it might think proper, but a positive duty was imposed to transfer such title as it acquired to the purchaser from the United States, and a county could acquire no rights to the lands by a refusal to observe the requirements of the statute. Indeed, we think it a fair and reasonable construction of the acts of 1852 and 1854, when considered in connection with the acts of Congress, to hold that where lands had been bought in good faith from the United States
175 the title to such lands did not become vested in the county, but passed to the purchaser, under his entry.

The copy of the certificate of entry procured from the Land Office at Washington and read in evidence contained a statement written across its face that the entry had been cancelled, and also another statement that it had been reinstated. The Commissioner of the General Land Office had no authority to vacate the entry, and any order that he may have made did not affect the rights of Egan. Brill *vs.* Stiles, 35 Ill., 305.

In conclusion, we regard the decision of the circuit court as right, and the judgment will be affirmed.

Judgment affirmed.

SCHOLFIELD, *J.:*

I concede that where a circuit court renders a final judgment upon insufficient evidence the only mode of correcting the error is by correcting the evidence in a bill of exceptions and then taking the record, by appeal or writ of error, before the proper appellate tribunal for review. The circuit court retains no jurisdiction over a case after the expiration of a term at which final judgment is rendered, and hence has no jurisdiction after that term to correct it in a matter of substance; but a final judgment is one that puts an end to the suit, at least until it shall be reversed or set aside. 3
176 Blackstone's Commentaries (Sharswood's edition), 388–399; Freeman on Judgments, section 21; 7 American and English Ency. of Law, p. 967. On the other hand a judgment which is rendered as to some steps in the cause without determining the rights of the parties in that suit, but leaving them to be determined by a further judgment, is interlocutory (Freeman on Judgments, section 31), and therefore an order granting a new trial in an action of ejectment which finally determines no rights of the parties in that suit is not a final judgment. (Williams *et al. vs.* La Valle *et al.*, 64 Ill., 110.) Analogous cases are Bolton *vs.* McKinley, 22 Ill., 203,

holding that a judgment vacating and setting aside a judgment entered up as by confession is not a final judgment; and Walker *vs.* Oliver, 63 Ill., 199, holding that a judgment vacating and setting aside a judgment by default is not a final judgment; and to like effect are also Branham *vs.* Fort Wayne and S. Railroad Co., 7 Ind., 524, and Spaulding *vs.* Thompson, 12 *id.*, 477.

The reference in the opinion of the majority of the court to Freeman on Judgments discloses nothing in conflict with this principle. He is speaking of an action on bill or petition to set aside a judgment, and, of course, there, as he says, "the whole scope and object of the suit being to vacate the former judgment and to procure a new trial, and the issues all being made up for that purpose their determination necessarily puts an end to the suit" (section 18), and that is all that is held in the authorities cited to sustain that statement. (Belt *vs.* Davis, 1 Cal., 134; McCall *vs.* Hitchcock, 7 Bush., 615.)

177 There is here no suit to vacate a former judgement. There is simply an order in a suit in which a former judgment was rendered vacating and setting aside that judgment and suspending final judgment in the suit until after a subsequent trial shall be had. Until final judgment shall be rendered in the suit the whole record is before the court, and an interlocutory order or judgment may be corrected at any time. Ogle *vs.* Lee, 2 Cranch., 33; Bush *vs.* Seguin *et al.*, 24 Ill., 254; Constantine *vs.* Foster, 57 *id.*, 36; Kilmer *vs.* The People *ex rel.*, 106 *id.*, 529; Fort Dearbon Lodge *vs.* Klein, 115 *id.*, 177; Setzke *vs.* Setzke, 121 *id.*, 30.

In my opinion the evidence shows that the costs were not all paid within the year, and hence the order granting a new trial was erroneously entered. The right to a new trial in such cases is purely statutory. We are not authorized to go beyond the letter of the statute and be governed by what we may deem the peculiar equities in the case. What it says shall be done, and until that is done the court is without power to grant a new trial. Oetgen *vs.* Ross, 36 Ill., 335; Emmons *vs.* Bishop, 14 *id.*, 152; Goodhue *vs.* Baker, 22 *id.*, 262; Pugh *vs.* Reat, 107 *id.*, 440; see also Dawson *vs.* Shillock, 29 Minn., 89.

I therefore dissent from so much of the opinion of the majority of the court as holds that the court had authority to grant a new trial in the case.

178 And be it further remembered that on, to wit, the eighteenth day of January, in the year of our Lord one thousand eight hundred and ninety, an order was made by said court, which is in words and figures following, to wit:

THE COUNTY OF COOK
vs.
THE CALUMET & CHICAGO CANAL & DOCK COMPANY. } Appeal from Cook.

On this day come again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error,

and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.

And it is further considered by the court that the said appellee recover of and from the said appellant costs by it in this behalf expended.

I, E. A. Snively, clerk of the supreme court in and for the central grand division, State of Illinois, do hereby certify that the foregoing is a complete, true, and correct copy of the records, opinions, and
179 orders of the supreme court in a certain case wherein The County of Cook was appellant and the Calumet and Chicago Canal and Dock Company was appellee as the same appears of record and — the files of my office.

In testimony whereof I hereunto set my hand and affix the seal of said supreme court, at Springfield, this 25th day of September, in the year of our Lord one thousand eight hundred and ninety.

Seal of the Supreme Court, State of Illinois.

E. A. SNIVELY,
Clerk Supreme Court.

180 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

The United States of America to the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said supreme court, between The County of Cook, plaintiff in error, and The Calumet and Chicago Canal and Dock Company, defendant in error, in an action of ejectment, a manifest error hath happened, to the great damage of the said The County of Cook, plaintiff in error, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1890, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fourth day of September, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the 115th year.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

WM. H. BRADLEY,
Clerk U. S. Circuit Court, Nor. Dist. Ill.

181 [Endorsed:] Supreme Court of the United States. The County of Cook, plaintiff in error, *vs.* The Calumet and Chicago Canal and Dock Co., defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office of the supreme court of the State of Illinois, at Springfield, Ill.

STATE OF ILLINOIS,
Supreme Court, Central Grand Division, } *ss:*

In obedience to this writ of error I hereto return a full, true, and correct copy of the records from the circuit court of Cook county, together with a full, true, and correct copy of the various orders, judgments, opinions, and all other proceedings had in the supreme court, State of Illinois, in said suit wherein The County of Cook was appellant and The Calumet and Chicago Canal and Dock Company was appellee as the same appears from the records and files in my office.

Witness my hand and the seal of the supreme court, State of Illinois, this 25th day of September, A. D. 1890.

Seal of the Supreme Court, State of Illinois.

E. A. SNIVELY,
Clerk of Supreme Court, State of Illinois.

182 UNITED STATES OF AMERICA:

In the Supreme Court, to the October Term, A. D. 1890.

To one of the justices of said court:

Your petitioner, The County of Cook, of the State of Illinois, by Consider H. Willett and Edgar Terhune, its attorneys, for the purpose of obtaining a writ of error in the case of The County of Cook *vs.* The Calumet & Chicago Canal & Dock Company from said Supreme Court of the United States to the supreme court of the State of Illinois, would respectfully submit the following facts:

1st. Said county of Cook brought its action of ejectment against said Calumet & Chicago Canal & Dock Co. to recover the southwest quarter of section seven (7), township thirty-seven (37) north, range fifteen (15) east, of the third (3rd) principal meridian, it being about forty-six acres of land; which case, being appealed to the supreme court of Illinois, was decided against Cook county in an opinion rendered January 18th, 1890, a copy of which is hereto attached

and marked Exhibit A, and a judgment for costs was rendered against the county.

2nd. The record shows from evidence contained in it that the amount in controversy is of the value of $46,000.00.

3rd. The county of Cook claims title and rights to said lands by virtue of an act of Congress known as the swamp-land act, passed Sept. 28th, 1850, and found in 9 U. S. Stat., 519, and its amendments,
183 the surveyor general of the United States, in accordance with the regulations of the General Land Office, having issued a certificate October 29th, 1853, certifying said lands to be swamp lands, and an act of the Legislature of the State of Illinois giving all swamp lands to counties within whose limits the same were situated, and the decision of said supreme court of Illinois is against the title and right specially set up and claimed to said lands by said county of Cook under said swamp-land statute and its amendments.

4th. Some of the Federal questions involved are as follows: In construing the acts of Congress passed March 2nd, 1855, 10 U. S. Stat., 634, and March 3, 1857, 11 U. S. Stat., 251, said opinion denies the right and title of said Cook county to said lands under said act of Congress of September 28th, 1850. Said opinion denies the title and right of said Cook county under the certificate certifying said lands to be swamp lands, of October 29th, 1853. Said opinion gives effect to the register and receiver's certificate for said lands, which was dated October 20th, 1853, but cancelled August 10th, 1855.

Your petitioner would pray for an allowance of a writ of error directed to the clerk of said supreme court of the central grand division of said State of Illinois to transmit a certified copy of the record of said case to the Supreme Court of the United States.

THE COUNTY OF COOK,
By CONSIDER H. WILLETT AND
EDGAR TERHUNE,
Its Attorneys.

Chicago, Ills., Sept. 4th, 1890.

184 & 185 Writ of error allowed.

MELVILLE W. FULLER,
Chief Justice of the United States.

186 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

To the Calumet and Chicago Canal and Dock Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1890, pursuant to a writ of error, wherein you are defendant, filed in the clerk's office of the supreme court of Illinois for the central grand division, and wherein The County of Cook is plaintiff, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United

States, this 4th day of September, in the year of our Lord one thousand eight hundred and ninety.

MELVILLE W. FULLER,
Chief Justice of the United States.

187 [Endorsed:] Supreme Court of the United States. The County of Cook *vs.* The Calumet and Chicago Canal and Dock Company. Citation to October term, 1890. Consider H. Willett att'y for plaintiff in error.

CHICAGO, ILLS., *Sept. 8th*, 1890.

I hereby admit the service of the within citation by copy this 8th day of Sept., A. D. 1890, the original citation having been exhibited to me.

CHARLES M. OSBORN,
SAMUEL W. SYNDE,
JOHN B. COHRS,
Attorneys for The Calumet and Chicago Canal and Dock Company, Defendant in Error.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

I served the within citation on the within-named defendants in error by exhibiting the same to —— ——, attorney for said —— ——, on the — day of ——, A. D. 189–, and delivering to him a true copy thereof, and by exhibiting the same to —— ——, attorney for —— ——, on the — day of ——, A. D. 189–, and delivering to him a true copy thereof, and by exhibiting the same to —— —— and at the same time delivering to each of them a true copy thereof.

—— ——,
U. S. Marshal, Northern District of Illinois.

STATE OF ILLINOIS,
County of Cook, } *ss:*

—— ——, being first duly sworn, doth depose and say that he served the within citation on the within-named defendants in error by —.

—— ——.

Subscribed and sworn to before me this — day of ——, 189–.

—— ——.

188 Know all men by these presents that we, Isaac R. Hitt and Consider H. Willett, of the county of Cook and State of Illinois, are held and firmly bound unto the Calumet & Chicago Canal & Dock Company in the full and just sum of one thousand dollars, to be paid to the said Calumet & Chicago Canal & Dock Co., its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of September, A. D. 1890.

Whereas lately, in an ejectment suit of The County of Cook against The Calumet & Chicago Canal & Dock Co., depending in the supreme court of the State of Illinois, a judgment was rendered against the County of Cook, in the State of Illinois, on the 18th day of January, 1890; and the County of Cook having obtained a writ of error from said judgment to the Supreme Court of the United States to reverse the aforesaid judgment, and a citation having issued directed to the said Calumet & Chicago Canal & Dock Co., citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the County of Cook shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ISAAC R. HITT. [SEAL.]
CONSIDER H. WILLETT. [SEAL.]

Sealed and delivered in the presence of—
F. A. ROOT.

189 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Isaac R. Hitt and Consider H. Willett, being first duly sworn, depose and say and each for himself saith that he is worth one thousand dollars over and above all just debts and liabilities and exemptions.

ISAAC R. HITT.
CONSIDER H. WILLETT.

Notarial Seal Frederick A. Root, Cook County, Ill.

Sworn to this 4th day of September, A. D. 1890, before me—
F. A. ROOT,
Notary Public.

The within bond and sureties thereto approved.
M. W. FULLER,
Chief Justice of the United States.

190 UNITED STATES OF AMERICA:

In the Supreme Court, to the October Term, A. D. 1890.

THE COUNTY OF COOK, Plaintiff in Error,
vs.
THE CALUMET & CHICAGO CANAL & DOCK COMPANY, Defendants in Error.
} Assignment of Error.

And now comes The County of Cook, the plaintiff in error, by Consider H. Willett, its attorney, and says that in the record of proceedings aforesaid there is manifest error, in this, to wit:

First. The supreme court of the State of Illinois erred in finding that the title to the land mentioned in the declaration was not good in Cook county under and by virtue of the act of Congress called the "swamp-land act," in force September 28, 1850. 9 U. S. Stat., 519.

Second. The supreme court of the State of Illinois erred in not holding that the title to said land was confirmed in said Cook county by the act of March 3, 1857. (11 U. S. Stat., 251.)

Third. The supreme court of the State of Illinois erred both upon the facts and upon the law in finding the title to said land to be in defendant in error and in entering judgment against the plaintiff in error for costs.

Fourth. The supreme court of the State of Illinois erred in
191 refusing to decide said cause upon its legal merits and deciding it upon the supposed equities involved in said record.

Fifth. The supreme court of the State of Illinois erred in sustaining the trial court in its propositions of law refused for the plaintiff in error and in sustaining the propositions of law held for the defendant in error.

Sixth. The supreme court of the State of Illinois erred in sustaining the trial court in the admission of improper testimony, to wit, the register and receiver's certificate to the land in question, dated October 20, 1853, the same being illegal, and also because the same was cancelled August 10, 1855, the subsequent chain of defendant's title resting upon said cancelled certificate.

Seventh. The supreme court of the State of Illinois erred in sustaining the trial court in the introduction of improper evidence, the register and receiver's certificate of said land to John W. Bunn, May 24, 1870, and the patent to his assignee, James H. Bowen, November 15, 1873.

Eighth. The supreme court of the State of Illinois erred in sustaining the trial court in permitting evidence to show that the land was not swamp land on October 28, 1850, the same having been certified by the Government surveyor general to be swamp land October 29, 1853.

By reason whereof the plaintiff prays such judgment may be reversed.

CONSIDER H. WILLETT,
Attorney for Plaintiff in Error.

Endorsed on cover: Illinois supreme court. No. 1406. The County of Cook, plaintiff in error, *vs.* The Calumet and Chicago Canal and Dock Company. Filed October 13, 1890.

UNITED STATES OF AMERICA—IN THE SUPREME COURT.

To the October Term, A. D. 1890.

THE COUNTY OF COOK, Plaintiff in Error,
vs.
THE CALUMET & CHICAGO CANAL AND DOCK COMPANY, Defendant in Error.

ADDITIONAL ASSIGNMENT OF ERROR.

And the said plaintiff in error, as another and further error in said cause, comes and says that:

9th. The Supreme Court of the State of Illinois erred in holding that under the Act of June 22d, 1852, of said State, that said land was conveyed to said Cook County, upon a condition, and not absolutely, the action of said court in holding that the Act of March 4th, 1854, of said State, transferred said title of Cook County in said land to William B. Egan, and his assigns, impaired the obligation of the contract in said Act of 1852, whereby said land was conveyed to said Cook County.

THE COUNTY OF COOK,
By CONSIDER H. WILLETT,
Counsel for Plaintiff in Error.

The defendant, by its counsel, consents that the foregoing assignment of error, numbered nine, may be filed and taken as if the same had been originally assigned upon the record, the defendant reserving to itself all rights of objection or exception thereto which it would have had if the same had been assigned together with the other alleged errors therein.

CHARLES M. OSBORN, AND
SAMUEL A. LYNDE,
Counsel for Defendant in Error.

Supreme Court, U. S.
FILED
DEC 22 1890
JAMES H. MCKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 1406.

THE COUNTY OF COOK,
Plaintiff in Error,
vs.
THE CALUMET & CHICAGO CANAL & DOCK CO.,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

EDGAR TERHUNE,
COUNTY ATTORNEY OF COOK COUNTY.

CONSIDER H. WILLETT and
CHARLES B. WOOD,
OF COUNSEL FOR PLAINTIFF IN ERROR.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1890.

No. 1406.

THE COUNTY OF COOK,
Plaintiff in Error,
vs.
THE CALUMET & CHICAGO CANAL & DOCK CO.,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

ABSTRACT OF RECORD.

1 Stipulation to omit specified portions of the record.

2 The record filed in the Supreme Court of the State of Illinois,
June 6, 1888, shows trial before Hon. A. N. Waterman, judge
3 of the Circuit court of Cook county. Jan. 31, 1883, declaration
in ejectment, filed in the clerk's office of the Circuit court of Cook county, Illinois, by the plaintiff in error against defendant, to recover possession of the S. W. ¼ Sec. 7, T. 37 N., R. 15 E. 3d P. M., north of Indian boundary line, $46\frac{48}{100}$ acres. To plain-
4 tiff's damage of $50,000. On Feb. 20, 1883, plea of not guilty
filed by defendant in error. On March 1, 1886, trial before Hon. John G. Rogers, judge of said Circuit court, jury waived findings for plaintiff, motion for a new trial overruled, and judgment that plaintiff is entitled to an estate in fee simple to said lands and
5 costs, etc.

On Jan. 25, 1887, before the Hon. Lorin C. Collins, judge of said Circuit court, a new trial granted under the statute.

6 On Jan. 28, 1888, before A. N. Waterman, trial judge, findings for defendant. Plaintiff's motion for a new trial overruled, and judgment for defendant, and an appeal allowed to the Supreme court.

7 On Feb. 27, 1888, a bill of exceptions was filed in said cause, the plaintiff to maintain the issues upon its part, offered in evidence, a certified copy of a certificate of the commissioner of

8 the General Land Office, which certificate was dated Jan. 11, 1884, and certified that the lands in question were contained in list of swamp selections, returned to the General Land Office by the surveyor general, Oct. 29, 1853, and that said list is now on file in his office, and signed by N. C. McFarland, Commissioner of the General Land Office, showing that the list in evidence had on Oct. 29, 1853, been filed in the surveyor general's office, for the states of Illinois and Missouri, by John Loughborough, surveyor general, who certified said land to be a selection made by the state agents and filed by them in his office, to wit: "John Van Horn for the county of Cook. That I have carefully compared the same, with the field notes, township plats and other evidences on file in this office, and am satisfied the greater part of each forty-acre tract, or other equivalent subdivision of the lands embraced in said list, is swamp or subject to overflow within the meaning of the act of Congress of the 28th of September, 1850, and that said lands rightfully inure to the State of Illinois, under said act.' "

(This certificate is identical with the one passed upon in the case of *Martin* v. *Marks*, 97 U. S., 345.)

9 The plaintiff also offered a certificate of the State Auditor of the State of Illinois, dated Feb. 2, 1882, showing the lands in question to be embraced in list No. 4 of swamp and overflowed lands selected as inuring to the State of Illinois, under the provisions of the Act of Congress approved Sept. 28, 1850, in the district of lands subject to sale at Chicago, Illinois. Said certificate also contained the following:

"GENERAL LAND OFFICE, May 7, 1886.

This is to certify that the foregoing tracts of land were duly selected and reported to this office as swamp land prior to the passage of the confirmatory act of Congress of March 3, 1857.

"(Signed)

"W. W. CURTIS."

"GENERAL LAND OFFICE, May 7, 1866.

"Respectfully submitted for approval.

"(Signed),

"J. M. EDMUNDS,
"*Commissioner*."

"DEPARTMENT OF INTERIOR, May 8, 1866.

"The foregoing list of selections is hereby approved, subject to any valid legal rights that may exist to any of the tracts therein described.

"(Signed),

"JAMES HARLAN,
"*Sec'y*."

"GENERAL LAND OFFICE, May 10, 1866.

"I, J. M. Edmunds, Commissioner of the General Land Office, do hereby certify that the foregoing is a true copy of approved list No. 4 of swamp and overflowed lands selected as inuring to the
10 State of Illinois, under the Act of Congress approved September 28, 1850, in the district of lands subject to sale at Chicago, (now Springfild) Illinois."

Seal and certificate of Charles P. Swigert, State Auditor, that "the annexed instrument is a true, full and correct copy of a list of swamp and overflowed lands, now on file in, and forming part of the records of this office."

The plaintiff rests.

It was stipulated that either party might read from Lester's Land Laws, and from Copp's Public Land Laws, with the same effect as though the same were general statutes of the United States, or of the State of Illinois.

The defendant to maintain its issues introduced in evidence, a certified copy of the entry of the Register and Receiver of the United States Land Office at Chicago, Illinois, dated Oct.
11 20, 1853, to William B. Egan, showing the location of this land, with Military Bounty land warrant, No. 2,495 which certificate had written across its face, "canceled, see letter to R. R. at Springfield, August 10, 1855. Binckley," and written across the face in red ink "Re-instated February 15, 1883. Warrant No. 101,043, Act of 1850, 40A substituted."

12 Among other indorsements was the following, "Wt. Susp. for erasure, party desires its location canceled. See Reg. (Chicago) letter of May 28, 1855, canceled, and party allowed to re-locate, with another Wt. No. 101,043, Aug. 10, 1855."

"General Land Office, April 25, 1883, N. C. McFarland, Commissioner of the General Land Office, under his seal, certifies, that "the annexed copies are true and literal exemplifications from the files of this office."

The defendant offered in evidence, a certified copy of a telegram and letter, from the Secretary of the Interior, withdrawing the land from sale, as follows:

"GENERAL LAND OFFICE, Sept. 19, 1850.

"R. R., Chicago, Illinois."

"Withhold from sale or entry, till further orders, all the lands," including the land in question with others.

J. BUTTERFIELD,
Commissioner.

13 Sept. 20, 1850, R. & R. CHICAGO, Illinois.

GENTLEMEN: President has directed that the lands within a suitable distance on each side of the supposed route of (the railroad) shall be withheld from sale "until the road is located, and land selected, provided the time does not exceed six months."

The lands were by proclamation of the President April 3, 1852, restored to market.

14 Nov. 20, 1855, R. W. McClelland, Secretary of the Interior, gave an opinion that swamp lands within the six miles limit of the Chicago and Mobile Railroad grant of Sept. 20, 1850, were by such grant reserved from the operation of the swamp land grant of Sept. 28, 1850.

18 In April, 1854, Eagan conveyed the land to Henry S. Monroe. On May 11, 1871, Monroe conveyed to James H. Bowen.

On May 24, 1870, John W. Bunn entered said land by a certificate from the United States Register and Receiver at Springfield, Illinois, and assigned it to James H. Bowen Oct. 3, 1870.

19 On Nov. 15, 1870, the United States patented said land to James H. Bowen under the Bunn certificate. Bowen conveyed to defendant in error Jan. 1, 1872.

21 James Nocquet testified that the lands were within six miles

of the location of the Illinois Central Railroad, which was located in 1851 or 1852.

22 Statement of payment of taxes.

HENRY S. MONROE, testified: I purchased this property from Eagan for attorney's fees. I never took possession of it.

JAMES MARSH, testified: The land was worth $1,000 per acre.

23 Plaintiff's propositions of law.

26 Defendant's propositions of law.

28 Motion for a new trial.

30 Assignment of errors in the Supreme Court of the State of Illinois.

31 Order of the Supreme Court of Illinois reversing and remanding said cause. Nov. 14, 1888.
Additional record filed Jan. 19, 1889.

34 Opinion of the court upon rehearing, affirming the judgment of the court below, Jan. 18, 1890.

40 Dissenting opinion by Justice Scholfield, Jan. 18, 1890.

42 Writ of error to the United States Supreme court.

43 Petition for writ of error.

44 Writ of error allowed Sept. 4, 1890.
Service admitted Sept. 8, 1890.

45 Appeal bond.

46 Assignment of errors.

ASSIGNMENT OF ERRORS.

The plaintiff's assignment of errors. (Rec., 47.)

1. The Supreme Court of the State of Illinois erred in finding that the title to the land mentioned in the declaration was not good in Cook County, by force of the Act of Congress of Sept. 28, 1850.

2. In not holding that the title to said land was confirmed in said County by the Act of Congress March 3, 1857.

3. Said Court erred, both upon the facts and upon the law, in finding the title to said land to be in the defendant.

4. Said Court erred in refusing to decide said suit in ejectment upon its merits, and in deciding it upon its supposed equities involved in the record.

5. Said Court erred in sustaining the trial court in its propositions of law refused for plaintiff, and in sustaining defendant's propositions of law.

6. Said Court erred in sustaining the trial court in the admission

of improper testimony, to wit, the register and receiver's certificate to the land in question, dated Oct. 20, 1853, the same being illegal, and also because the same was cancelled Aug. 10, 1855. The subsequent chain of defendant's title resting upon said cancelled certificate.

7. Said Court erred in sustaining the trial court in the introduction of improper evidence, the register and receiver's certificate of said land to John W. Bunn, May 24, 1870, and a patent to his assignee James H. Bowen, Nov. 15, 1873.

8. Said Court erred in sustaining the trial court, in permitting evidence to show that the land was not swamp land, Oct. 28, 1850, the same having been certified by the Government Surveyor General to be swamp land Oct. 29, 1853.

9. Said Court erred in holding that by the Act of June 22, 1852, that said land was not conveyed absolutely. The action of said court in holding that said Act of March 4, 1854, transferred said title of Cook County in said land to William B. Eagan and his assigns, impaired the obligation of the contract in the Act of 1852, whereby said land was conveyed to plaintiff.

STATEMENT OF MATERIAL FACTS AND LAW.

The Constitution gives Congress the power of disposal of the public lands.

The Swamp Land Grant Sept. 28, 1850, conveyed all the swamp lands in Illinois to that State.

The State, by act of June 22, 1852, conveyed such lands to the counties in which they were situated. The County of Cook brings ejectment for the lands in question which are now and were, June 22, 1852, within its boundaries, claiming them as swamp lands.

The material facts and law upon which the swamp land title of the plaintiff rests are as follows: On Sept. 28, 1850 (9 Stats., 519), Congress passed an act commonly called the Swamp Land Act. By the first section of such act, the swamp lands in the State of Arkansas are granted to that state; and by the fourth section, the provisions of the Swamp Land Act are extended to the other states, including the State of Illinois.

The words making the grant one *in præsenti*, are found in section one, and after describing the grant as all of the swamp lands located in such states "remaining unsold at the passage of this act," such grant reads as follows: "*Shall be and the same are hereby granted to said State.*"

The Constitution of the United States, in Art. 4, Sec. 3, cl. 2, provides that "Congress shall have power to dis-"pose of, and make all needful rules and regulations, re-"specting the territory or other property belonging to the "United States."

The State of Illinois, by an act of its legislature June 22, 1852 (Ill. Laws, 1852, 178, and Gross Ill. Stats.,

729), granted the swamp lands lying in the several counties in the State of Illinois to the counties in which they were situated, using language identical with that contained in the act of Congress granting such lands to the State, the exact words being:

"All the swamp and overflowed lands granted to the State of Illinois by the act of Congress, entitled 'An act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits,' approved Sept. 28, 1850, *are hereby granted to the counties respectively in which the same may lie or be situated.*"

Under such legislation of Congress the land in question was selected by the United States government as swamp land. The conveyance to the State is such act of Congress, Sep. 28, 1850. The evidence of title from the United States to the State identifying the land to be swamp land is *the certificate of the commissioner of the general land office.* (Rec., 8.)

The statute of the state June 22, 1852, without any action by any state officer vested the title to the land in the County of Cook. To know what lands passed under such swamp land grants a selection or identification was made. The State authorized this to be done by the county surveyors making an actual examination in the field (§ 5 Laws Ill. 1852, 178) who made plats of all the swamp and overflowed lands in their respective counties which were filed in the county clerk's office.

The commissioner of the general land office Nov. 21, 1850 (1 Lester's Land Laws, 543), indicated that the foregoing mode of selection would be acceptable to the government.

The title to this land was conveyed by the act of June 22, 1852, (Ill. Laws 1852, 178), and not by the act of

March 4, 1854, (Ill. Laws 1854, 19, 21,) which as to Cook County only provided what should constitute evidence of title to swamp land.

Such evidence was the state auditor's certificate (Rec., 9) which takes the place of and is just such a piece of evidence showing this land to be swamp land as the certificate of the commissioner of the general land office.

The County's Chain of Title.

The land belonging to the government Sept. 28, 1850, Congress, by the first section of act passed that day (9 Stats., 519), granted it to the State of Illinois.

The State, by the first section of an act of June 22, 1852 (Ill., Laws, 1852, p. 178), granted the land to the County of Cook. Both of such legislative grants were *in præsenti*, conveying the title, upon the date, of the passage of such acts.

Outside of such legislative grants the evidences of title are the certificate of the Commissioner of the General Land Office and the certificate of the State Auditor.

The foregoing facts render the title of the plaintiff complete. Such title is not disturbed by any of the many plausible defenses presented by the defendant.

Defendant's Chain of Title.

The defendant introduced a certified copy from the Commissioner of the General Land Office of a Register and Receiver's certificate of the entry of the land, dated Oct. 20, 1853, to William B. Eagan, which showed upon its face that it had been canceled Aug. 10, 1855. (Rec., 11.)

William B. Eagan conveyed to Henry S. Monroe in April, 1854, and Monroe to James H. Bowen May 11, 1871.

As an independent title defendant gave in evidence a Register and Receiver's certificate to John W. Bunn, dated May 24, 1870, and its assignment to James H. Bowen Oct. 3, 1870, upon which a patent was issued Nov. 15, 1870. Bowen conveyed to defendant Jan. 1, 1872.

Taxes were paid by Bowen and the defendant, but not in such a way as to bring the title within any limitation laws of Illinois.

The lands lie within six miles of the line of the Illinois Central Railroad, as finally located in 1851 or 1852 (Rec., 21), and which grant was made September 20, 1850. (9 Stats., 466.)

The Supreme Court of Illinois held, that under the act of its legislature passed March 4, 1854 (Ill. Laws, 1854, 19), the title of the county under the act of June 22, 1852, should be conveyed to Eagan, and thereby impaired the obligation of the grant to the county.

No request was ever made by Eagan or his assigns to the Board of Supervisors of the County of Cook that the title of Cook County be conveyed to them.

[By stipulation of the parties there has been omitted from the record a bill of exceptions, concerning the motion for a new trial, under the statute, granted the defendant. Also, there has been omitted from the bill of exceptions containing the evidence of the trial court, all that evidence which showed that the land was or was not swamp lands in fact on Sept. 28, 1850. To show that the trial court found that it was swamp land in fact, on that date, the entire opinion of the trial court (a jury hav-

ing been waived), was put into the original bill of exceptions, and is now omitted as having no bearing upon the issues in this court. *By this action it is conceded that the Surveyor General's certificate of Oct. 29, 1853, approved by the Secretary of the Interior May 8, 1866, establishes the character of the land to have been swamp land on the 28th of September, 1850.* Also the propositions of law concerning the motion for a new trial have been omitted from the record. Otherwise the record contains a complete history of the proceedings in the trial court.]

Points and Authorities.

I.

THE FACTS OF THE RECORD GIVE THIS COURT JURISDICTION.

Crowell v. *Randell*, 10 Peters, 392.
Martin v. *Hunter*, 1 Wheat, 355.
Choueau v. *Eckhart*, 2 How., 372.
Cunningham v. *Ashley*, 14 How., 377.
Bell v. *Hearne*, 19 How., 252.
Garland v. *Wynn*, 20 How., 6.
Lytle v. *Arkansas*, 22 How., 193.
Jefferson Branch Bank v. *Skelly*, 1 Black, 436.
Bridge Proprietors v. *Hoboken Co.*, 1 Wall., 116.
Reichart v. *Felps*, 6 Wall., 160.
Silver v. *Ladd*, 6 Wall., 440.
Railroad v. *Smith*, 9 Wall., 95.
Martin v. *Marks*, 97 U. S. 345.
Hartman v. *Greenhow*, 102 U. S. 672.
Baldwin v. *Stark*, 107 U. S., 463.
Wright v. *Roseberry*, 121 U. S., 488.
Hoadley v. *San Francisco*, 124 U. S., 639.

II.

LEGISLATIVE GRANTS CONVEY AN ABSOLUTE PRESENT TITLE AS OF THE DATE OF THEIR PASSAGE. SUCH WAS THE SWAMP LAND GRANT CONVEYING THE LAND IN QUESTION TO THE STATE OF ILLINOIS, SEPTEMBER 28, 1850. SO WAS THE ACT OF THE LEGISLATURE OF ILLINOIS CONVEYING SUCH LAND TO COOK COUNTY, JUNE 22, 1852.

Wright v. *Roseberry*, 121 U. S., 488. (Overruling *Wright* v. *Roseberry*, 63 Cal., 252.)

Notes of R. S. U. S. by Gould and Tucker, 562.

French v. *Fyan*, 93 U. S., 169.

Railroad Co. v. *Fremont County*, 9 Wall., 89.

Railroad v. *Smith*, 9 Wall., 95; (affirming 41 Mo. 310.)

Martin v. *Marks*, 97 U. S., 345.

San Francisco Sav. Union v. *Irwin*, 28 Fed. Rep., 708. (Affirmed in 136 U. S., 578; as governed by *Wright* v. *Roseberry*, 121 U. S., 488.)

SECRETARY OF THE INTERIOR—OPINIONS.

Secretary Stuart's opinion, Dec. 23, 1851. (1 Lester's Land Laws, 549, No. 578.)

Secretary Schurz' opinion, April 19, 1877. (2 Copps' Public Land Laws, 1048.)

Secretary Lamar's opinion, Feb. 25, 1886. (Decisions of Dept. Interior, Vol. 4, 415.)
Attorney General Black's opinion, Nov. 10, 1858. (9th Opinions, Attorney Generals, 254.)
Fletcher v. *Pool*, 20 Ark., 100.
Branch v. *Mitchell*, 24 Ark., 431–443.
Ringo v. *Rotan*, 29 Ark., 56.
Hendry v. *Willis*, 33 Ark., 833.
Owens v. *Jackson*, 9 Cal., 322.
Summers v. *Dickinson*, 9 Cal., 554.
Kernon v. *Griffith*, 27 Cal., 87.
Sacramento Valley Reclamation Co. v. *Cook*, 61 Cal., 341.
Tubbs v. *Wilhoit*, 73 Cal., 61.
Wilhoit v. *Tubbs*, 83 Cal., 279, 288.
Allison v. *Halfacre*, 11 Io., 450.
Railroad v. *Brown*, 40 Io., 333.
Connors v. *Meservey*, 76 Io., 691.
Supervisors v. *States Attorney*, 31 Ill., 68.
Dart v. *Hercules*, 34 Ill., 395.
Smith v. *Goodell*, 66 Ill., 450.
Keller v. *Brickey*, 78 Ill., 133.
Bristol v. *Carroll Co.*, 95 Ill., 84.
Railroad v. *McDougal*, 113 Ill., 603.
Edmondson v. *Corn*, 62 Ind., 17.
Matthews v. *Goodrich*, 102 Ind., 557, 564.
State v. *Portsmouth Sav. Bk.*, 106 Ind., 435, 445.
Nitche v. *Earle*, 117 Ind., 270.
Busch v. *Donohue*, 31 Mich., 481.
Sterling v. *Jackson*, 69 Mich., 69.
Fore v. *Williams*, 35 Miss., 533.

Daniel v. *Purvis*, 50 Miss., 261.
Foster v. *Evans*, 51 Mo., 39.
Clarkson v. *Buchanan*, 53 Mo., 563.
Campbell v. *Wortman*, 58 Mo., 258.
Masterson v. *Marshall*, 65 Mo., 94.
R. R. v. *Snead*, 65 Mo., 239.
Funkhouser v. *Peck*, 67 Mo., 19.
Jasper County v. *Wadlow*, 82 Mo., 172.
Gaston v. *Stott*, 5 Or., 48
Miller v. *Tobin*, 16 Pac. Rep., 161.

III.

THE CERTIFICATE OF THE COMMISSIONER OF THE LAND OFFICE THAT THE LAND HAD BEEN SELECTED AS SWAMP LAND WAS EVIDENCE OF TITLE.

Martin v. *Marks*, 97 U. S., 345.
Jasper Co. v. *Wadlow*, 82 Mo., 172.
Fremont County v. *R. R.*, 22 Io., 91.
San Francisco Sav. Union v. *Irwin*, 28 Fed. Rep., 708.
Gould & Tucker's notes, R. S. U. S., 562.
U. S. R. S., § 891.
R. R. v. *Smith*, 41 Mo., 311.

IV.

THE LIST OF SWAMP LANDS IN THE OFFICE OF THE STATE AUDITOR OF THE STATE OF ILLINOIS, WAS ALSO SUFFICIENT EVIDENCE THAT THE TITLE TO THE LAND IN QUESTION HAD BECOME VESTED IN THE STATE OF ILLINOIS.

Dart v. *Hercules*, 34 Ill., 395.
County of Piatt v. *Gumley*, 81 Ill., 350.
Keller v. *Brickey*, 78 Ill., 133.
Bristol v. *Carroll Co.*, 95 Ill., 88.
French v. *Fyan*, 93 U. S., 169.
Fletcher v. *Pool*, 20 Ark., 100.
Clarkson v. *Buchanan*, 53 Mo., 563, 571.
Edmondson v. *Corn*, 62 Ind., 17.

AND A CERTIFIED COPY THEREOF IS COMPETENT EVIDENCE.

Sec. 8, Act March 4, 1854, Ill. Laws, 1854, p. 19, Gross Ill., Stat. 735.
Ry. Co. v. *McDougal*, 113 Ill., 604.

V.

THE ACT OF CONGRESS OF MARCH 3, 1857, CONFIRMED THE TITLE TO THE LAND IN QUESTION IN THE STATE.

11 U. S. Stat. at Large, 251.
American Emigrant Co. v. *R. R.* 47 Ia. 515.
Smith v. *Goodell*, 66 Ill., 450.
Funkhouser v. *Peck*, 67 Mo., 20.
Martin v. *Marks*, 97 U. S., 345.

Matthews v. *Goodrich*, 102 Ind., 557.
McConnell v. *Wilcox*, 1 Scam., 360.
Campbell v. *Wortman*, 58 Mo., 358.
10 U. S. Stat. at Large, 634.
Gaston v. *Stott*, 5 Oregon, 60.
Fletcher v. *Pool*, 20 Ark., 104.
R. S. U. S. § 2450.
Foster v. *Evans*, 51 Mo., 39.
R. R. v. *Fremont Co.*, 9 Wall., 89.
Jasper County v. *Wadlow*, 82 Mo., 172.
2 Dec. Sec. Int., 653.

VI.

WHERE THE DISTINCTION EXISTS AS AT COMMON LAW, AS IT DOES IN ILLINOIS BETWEEN EQUITY AND COMMON LAW REMEDIES, AN ACTION OF EJECTMENT CANNOT BE DEFEATED BY EQUITABLE DEFENSES.

Chiniquy v. *The Catholic Bishop of Chicago*, 41 Ill., 148.
O'Neal v. *Wabash Ave. Bap. Ch.*, 48 Ill., 349.
Carpentier v. *Montgomery*, 13 Wall., 480, 496.
Chiles v. *Davis*, 58 Ill., 411.
Johnson v. *Watson*, 87 Ill., 535, 540.
Finlon v. *Clark*, 118 Ill., 30.
Oldham v. *Pfleger*, 84 Ill., 102.
Wales v. *Bogue*, 31 Ill., 465.
Reese v. *Allen*, 5 Gilm. (Ill.), 236.

If defendant had any title here it was equitable, and could not be used as a defense to ejectment, but could only be asserted in equity.

Silver v. *Ladd*, 7 Wall., 219.
Meader v. *Norton*, 11 Wall., 442.
Johnson v. *Towsley*, 13 Wall., 72.
Walker v. *Hedrick*, 18 Ill., 570.
McDowell v. *Morgan*, 28 Ill., 528.
Aldrich v. *Aldrich*, 34 Ill., 32.
Forbes v. *Hall*, 34 Ill., 159.

VII.

THE STATE OF ILLINOIS BY ACT OF CONGRESS OF SEPT. 28, 1850, BECAME VESTED WITH THE TITLE TO THE LAND IN QUESTION, AND SUCH TITLE WAS GRANTED TO THE COUNTY OF COOK BY THE FIRST SECTION OF THE ACT OF JUNE 22, 1852, WHEN THE OBLIGATION OF SUCH GRANT WAS IMPAIRED BY THE ACT OF MARCH 4, 1854, WHICH DIVESTED THE PLAINTIFF OF SUCH TITLE AND CONVEYED IT TO A SUBSEQUENT ENTRYMAN.

Defenses.

VIII.

THE EAGAN ENTRY WAS OCT. 20, 1853, AND THOUGH THE CERTIFICATE THAT THIS WAS SWAMP LAND WAS OCT. 29, 1853, YET IT RELATED BACK TO THE DATE OF THE GRANT SEPT. 28, 1850, AND WAS THE EARLIER AND BETTER TITLE.

THIS CERTIFICATE WAS CANCELLED BY REQUEST OF ITS HOLDER AUG. 10, 1855, AND NO CLAIM MADE UNDER IT TILL SINCE THE COMMENCEMENT OF THIS SUIT.

Davis v. *Filer*, 40 Mich., 310.

No statute of Illinois helped the Eagan entry.

IX.

DEFENDANTS TITLE UNDER BUNN'S ENTRY OF MAY 24, 1870, WAS A NULLITY, THE PLAINTIFF'S TITLE COMMENCING SEPT. 28, 1850.

Ill. Laws, 1859, 201.
Gross, Ill. Stats., 736.
Smith v. *Goodell*, 66 Ill., 450.
Ry. Co. v. *McDougal*, 113 Ill., 603, 608.
Tyler v. *Magwire*, 17 Wall., 253.

X.

THE RAILROAD GRANT OF SEPT. 20, 1850, CONVEYING EVEN SECTIONS AND MAKING THE LAND IN QUESTION, THE ODD SECTIONS, DOUBLE MINIMUM LAND DID NOT RESERVE SAID LAND FROM THE OPERATION OF THE SWAMP LAND GRANT.

Railroad grant, Sept. 20, 1850, (9 Stats. 466.)
1 Copps' Public Land Laws, (A. D. 1890), 1, 4 Stats., 687.
Gibson v. *Chouteau*, 13 Wall., 92.
Ham v. *State of Missouri*, 18 How, 132.
Wilcox v. *Jackson*, 13 Pet., 512.
Fremont County v. *R. R.*, 22 Io., 128; (affirmed 9 Wall., 89.)
Lytle v. *State of Ark.*, 9 How, 315.
Clement v. *Warner*, 24 How, 397.
Beaty v *Sale*, 43 Ill., 351.
Sec. Vilas, 8 Dec. Sec. Int., 308.
R. R. v. *Smith*, 41 Mo., 310.
Snell v. *R. R.*, 78 Io., 88.
San Francisco Sav. Union v. *Irwin*, 28 Fed. Rep., 708.

ARGUMENT.

I.

The Court has Jurisdiction of the Suit contained in this Record.

This jurisdiction is conferred by § 709 R. S., which reads:

"A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party under such constitution, treaty, statute, commission or authority may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Jurisdiction is also conferred by the United States Constitution Art. 1, § 10, Clause 1, which reads:

"No state shall * * * pass any * * * law impairing the obligation of contracts."

It is sufficient to give jurisdiction if the record shows that the state court must, in order to have arrived at the judgment pronounced by it, have decided a question which

would bring the suit within the section of the statute referred to.

Crowell v. *Randell*, 10 Peters, 392.
Martin v. *Hunter's Lessee*, 1 Wheaton, 355.
Chouteau v. *Eckart*, 2 How., 372.
Cunningham v. *Ashley*, 14 How., 377.
Garland v. *Wynn*, 20 How., 6.
Lytle v. *Arkansas*, 22 How., 193.

The decision of the Supreme Court of Illinois drew in question an authority exercised under the United States, to wit: The action of the Land Department in canceling the Eagan entry and the decision was *against* the validity of such cancellation and is therefore subject to be re-examined in this court and we most respectfully insist that the decision could not have been rendered without deciding against the validity of that cancellation.

The decision of the Supreme Court of Illinois also drew in question the validity of the act of Congress of Sept. 28, 1850, as being an absolute present grant of all swamp lands in the State of Illinois; for the reason that said Supreme Court could not sustain the validity of the Eagan entry made in 1853 without deciding against the validity of the act of Sept. 28, 1850, as being such absolute present grant to the State of Illinois.

The act passed by the Illinois Legislature, June 22, 1852, (§1 Ill. Laws, 1852, 178) was an absolute present grant to the counties of all swamp lands within their limits (and so far as Cook County was concerned the act was entirely free from all qualifications and restrictions, as will elsewhere be shown.)

The decision of the Supreme Court of Illinois sustaining the validity of a law amendatory therof which divested

the plaintiff of its title and gave it to the entryman under such canceled certificate passed by the Legislature, March 4, 1854 (Ill. Laws 1854, 19), is clearly subject to review in this court. The act of 1854 so sustained is a most flagrant violation of the grant (or contract) contained in the act of 1852, and so plainly within the prohibition of the Federal Constitution.

The Supreme Court has an appellate power to revise the judgment of the Supreme Court of a State whenever such court shall adjudge that not to be a contract which has been alleged by a litigant to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts.

Jefferson Branch Bank v. *Skelly*, 1 Black, 436.

Bridge Proprietors v. *Hoboken Co.*, 1 Wall, 116.

Hoadley v. *San Francisco*, 124 U. S. 639.

The court coupled the acts of its Legislature of June 22, 1852, and March 4, 1854, with the act of Congress of Sept 28, 1850, and its amendment of March 2, 1855, and refused to give effect to the act of Congress of March 3, 1857, which confirmed all existing lists of swamp lands where the lands were "vacant and unappropriated" and not occupied.

As was said, (WAYNE, J.), in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 443.

"Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide independently of all adjudication by the Supreme Court of a State, whether

or not the phraseology of the instrument in controversy was expressive of a contract, and within the protection of the Constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case it makes no difference in the obligation of this court in reversing the judgments of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of state legislation or has been made by a covenant or agreement by the agents of a State by its authority."

The amount involved in this suit is sufficient to confer jurisdiction. (Rec., 22.)

This court has assumed and retained jurisdiction of cases like the present in the following instances, among many others:

Bell v. *Hearne*, 19 How., 252.
Lytle v. *Arkansas*, 22 How., 193.
Bridge Proprietors v. *Hoboken Co.*, 1 Wall., 116.
Reichart v. *Felps*, 6 Wall., 160.
Silver v. *Ladd*, 6 Wall., 440.
Railroad v. *Smith*, 9 Wall., 95.
Martin v. *Marks*, 97 U. S., 345.
Hartman v. *Greenhow*, 102 U. S., 672.
Baldwin v. *Stark*, 107 U. S., 463.
Wright v. *Roseberry*, 121 U. S., 488.

II.

Legislative grants are present absolute grants vesting and conveying title upon the day such legislative acts become statutes.

The record involves the construction of the act of Congress of Sept. 28, 1850, (9 Stats., 519) and the act of the Legislature of the State of Illinois of June 22, 1852. (Ill. Laws, 1852, 178.)

THE GRANT OF SWAMP LANDS *by the act of Congress of September 28, 1850*, (9 Stats., 519) WAS A PRSENT ABSOLUTE GRANT (IN PRÆSENTI) *vesting and conveying the the title to all the swamp lands unsold in the State of Illinois to such State upon the date of the passage of such act.*

We quote such statute and its title in full.

"AN ACT to enable the State of Arkansas and other states to reclaim the 'swamp lands' within their limits."

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, **the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.**

SEC. 2. And be it further enacted, that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, That in making out a list and plats, of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it, shall be excluded therefrom.

SEC. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated."
Approved Sept. 28, 1850. (9 Stats., 519.)

Under such legislation of Congress the Legislature of the State of Illinois did on June 22, 1852, pass an act the first section of which we quote in full as it is the only part of such act which applied to the County of Cook.

"All the swamp and overflowed lands granted to the State of Illinois, by the act of Congress entitled 'An act to enable the State of Arkansas, and other states, to reclaim the swamp lands within their limits,' approved Sept. 28, 1850, **are hereby granted to the counties, respectively, in which the same may lie or be situated,** for the purpose of constructing the necessary levees and drains to reclaim the same, and the balance of said lands, if any there be, after the same are reclaimed as aforesaid, shall be distributed in each county, equally, among the townships thereof, for the purposes of education, or the same may be applied to the construction of roads and bridges, or to such other purposes as may be deemed expedient by the courts or county judge hereinafter mentioned desiring so to apply it." (§ 1 Ill. Laws, 1852, 178 and Gross Ill. Stats. 729.)

Under these two acts, the County of Cook, claims title to the land in controversy as swamp land. We bring the two statutes together because what can be said of one as being a grant *in præsenti* can be said of the other.

These two acts were grants *in præsenti* of the day of their passage. In law, such acts were grants in themselves without the need of patent or conveyance in which the subject matter of the grant was described by its quality instead of by its quantity or by metes and bounds; and the description by quality is a sufficiently specific, and certain description, to make the grants operative as present absolute grants, as though the acts had used the language of surveyors.

The conveyance by force of a legislative grant vests the title in the donee or grantee without any action of conveyancing by patent, deed, certificate, etc., and such documents are only useful as evidence of title to identify the land granted.

Though governments are parties to such legislation yet the title passes by force of the passage of the legislative act and other evidence of title than the enactment of the law as patents or certificates are but further assurances of title useful to identify the grant and as evidence in litigation concerning the title; yet such instruments do not convey title or grant the land which is completely and fully done by the legislative act.

Such evidence of title as patents and official certificates that the land is of the character contemplated by the legislative act are mere waste paper, failing to become evidence of title unless such documents state facts within the grant of the legislative act. It is the statute which transfers the title. Such statutes occupy the place of deeds between individuals. No title can be granted which is not granted by the legislative act.

The identity of the land granted must be determined by the language of the statute making the grant and not by the language of any subsequent statute or the patent or other evidence of title.

Because difficult and embarrasing questions have arisen in identifying the lands granted; many decisions, and many statutes, have lost sight of the principle, that all such grants are *in præsenti*, as of the date of the passage of the legislative act.

Other statutes and decisions have gone upon the idea, that the grant did not operate, until evidences of title as patents were issued; and that until the issuance of such patents the grantor could dispose of such lands as though no legislative grant had been made. All the State and the National Legislatures and the State Supreme Courts with a few notable exceptions as Arkansas, Iowa, Indiana,

Missouri and Oregon have repeatedly made the blunder that the evidence of title, the patent, was the grant, the title, and not the legislative act. The United States Supreme Court has never wavered from the doctrine that legislative grants are *in præsenti;* commencing with *Rutherford* v. *Green's Heirs*, 2 Wheat., 197, and running down to *Irwin* v. *San Francisco, Sav. Union*, 136 U. S. 578.

And as a result of such principle that legislative grants are *in præsenti*: the United States' decisions have held that no subsequent legistative act, or the way of or the delay in, issuing patents could change the grant; so that the patents, lists of lands certified as required by such acts or subsequent statutes, could not change the grant but were merely further assurances or evidence of title which title passed by the original legislative act.

The first judicial construction of legislative grants was made by Chief Justice Marshall in *Rutherford* v. *Green's Heirs.*, 2 Wheat., 197. The decision involved the construction of an act of the legislature of the State of North Carolina, passed in 1782 and the decision was given in 1817.

The act gave 25,000 acres of land to General Green within the bounds reserved for the soldiers, and the words, "*shall be allotted for and are given*" were held to be a grant by force of the act, not needing any further granting act; and that when surveyed it became a gift of the particular lands contained in the survey which identified it and attached the title to the land surveyed, so a subsequent grant by another act related back to the inception of the title. In construing the above italicized words MARSHALL, C. J., (p. 197) said:

"It is contended that these words give nothing. They are in the future not in the present tense, and indicate an intention to give in future, but create no present obligation on the State nor present interest in General Greene.

"The court thinks differently. The words are words of absolute donation, not, indeed, of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers." * * *

"Given when? The answer is unavoidable—when they shall be allotted. Given how? Not by any future act; for it is not the practice of legislation to enact, that a law shall be passed by some future legislature; but given by force of this act."

Legislative grants are always held to vest title by force of the legislative acts.

We cite a few of many cases which do not involve the swamp land grant in which the doctrine that the title passes *in præsenti* and absolutely without any formal conveyance by officers and other assurance of title is the established doctrine.

Lessieur v. *Price*, 12 How,, 59.
Rutherford v. *Green's Heirs*, 2 Wheat., 196.
U. S. v. *Percheman*, 7 Pet.. 51.
Mitchel v. *U. S.*, 9 Pet., 711.
Ladiga v. *Roland*, 2 How., 581.
U. S. v. *Brooks*, 10 How., 442.
R. R. v. *R. R.*, 97 U. S., 491, 496.
Railroad Co. v. *Baldwin*, 103 U. S., 426.
Wood v. *R. R.*, 104 U. S., 329.
Van Wyck v. *Knevals*, 106 U. S., 360.

In *Courtright* v. *R. R.*, 35 Ia., 386, BECK, C. J., said (page 399):

"The act of Congress granting the lands to the State and the state law conferring them upon the railroad

was sufficient * * * to pass the title and vest it in the railroad corporation without any further assurances. The legislative act of the sovereign power is just as effective for that purpose as could be any formal conveyance executed by its officers. * * * Laws of Congress and of States, treaties, and grants by the proper authorities, have been held sufficient evidence of title without other assurance."

School lands—each sixteenth section—were a grant *in præsenti*, requiring no patent.

State v. *Ham*, 19 Mo., 592, 603.

UNITED STATES.

The decisions of the Supreme Court of the United States that all legislative grants are *in præsenti* are full and controlling.

The plaintiff in error contends that the principles enunciated in *Wright* v. *Roseberry*, 121 U. S., 488 (decided May 2, 1887, and which overruled *Wright* v. *Roseberry*, 63 Cal., 252), is decisive of the issues contained in this record.

Since this case was decided, it has been the controlling case, and governed the swamp land decisions. The decisions in the following cases were governed by it: *Irwin* v. *San Francisco Sav. Union*, 136 U. S., 578 S. C. 28 Fed. Rep., 708; Opinion of Sec. Vilas, Feb. 25, 1889 (8 Dec. Sec. Int., 308); *Sterling* v. *Jackson*, 69 Mich., 69; *Snell* v. *R. R.*, 78 Io., 88; *Miller* v. *Tobin*, 16 Pac. Rep., (Oregon) 161; *Chandler* v. *Cal. & H. Mining Co.*, 36 Fed. Rep., 665; *Kirby* v. *Lewis*, 39 Fed. Rep., 66.

In *Wright* v. *Roseberry*, 121 U. S., 488, Justice FIELD said, page 496:

"Soon after the passage of this act the question arose as to the time the grant took effect; whether at the date of the act, or on the issue of the patent to the state upon the request of the governor, after the list and plats of the lands were made out by the secretary of the interior and transmitted to him. The question was one of great importance to all the states in which there were swamp and overflowed lands. These lands amounted to many millions of acres.

"The object of the grant as stated in the act was to enable the several states to which it was made, to construct the necessary levees and drains to reclaim the lands; and the act required the proceeds from them, whether from their sale or other disposition to be used, so far as necessary, exclusively for that purpose. The early reclamation of the lands was of great importance to the states, not only on account of their extraordinary fertility when once reclaimed, but for the reason that until then they were the cause of malarial fevers and diseases in the neighborhood.

"The language of the first section of the act indicates a grant *in præsenti* to each state of lands within its limits of the character described, its words '*shall be and are hereby granted*' import an immediate transfer of interest, not a promise of a transfer in the future. It was only when the other sections of the act were read that a doubt was raised as to the immediate operation of the act. On the one hand, it was contended that these sections postponed the vesting of title in the state until the lands granted were identified, and a patent of the United States for them was issued. On the other hand, it was insisted that effect must be given to the clear words of the granting clause of the first section, which, *ex vi termini*, import the passing of a present interest, and that in consistency with them, the other provisions of the act should be regarded as simply providing the mode of identifying the lands, and furnishing documentary evidence of their identification, and not as a limitation upon vesting the right to them in the State, as this would make the investiture dependent upon the request of the governor, and not upon the act of Congress. It was also urged that idenification

of the lands could be made in a majority of instances from simple examination of them, and that no policy of the government could be advanced by postponing the passing of the title until the identification by the Secretary of the Interior; and that the clause providing, that upon the issue of the patent the fee should pass, was merely declaratory of the nature of the title, the patent operating merely by way of further assurance.

"The question thus brought to the attention of the department, under whose supervision the act was to be carried into effect, was one upon which men might very well differ, but after its solution had been reached, and the conclusion was acted upon, necessarily affecting titles to immense tracts of land, there should be the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned.

"There are numerous cases in the history of the country where Congress, after confirming to parties title to land, has directed that patents of the United States should be issued to them; yet it has been held that the patent in such cases operated merely as record evidence of the title, and added nothing to the title itself."

And the learned judge continued (p. 499): "The grants by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, are in many particulars analogous to the grant by the Swamp Land Act. They are usually of a specified number of sections of land on each side of the proposed route of the road, with a reservation of certain sales, or of other disposition, made before such road becomes definitely fixed. The usual words of grant in such cases are similar to those in the Swamp Land Act—"there is hereby granted—." Though it is impossible to locate the land granted until the route is fixed, yet when that is fixed the grant takes effect as of the date of the act. This would be equally the case were the mode prescribed to fix the boundaries more complicated and difficult. Thus in the case of *R. R.* v. *U. S.*, 92 U. S. 733, the language was 'There be and is hereby granted to the State of Kansas,' and in reference to it the court said, "It creates an immediate interest and does not indicate a purpose to

give in future. 'There be and is hereby granted' are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the land department, on this interpretation of them, has uniformly administered every previous similar grant. * * * They vest a present title in the State of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them." See also *Railroad Co.* v. *Baldwin*, 103 U. S. 426; *R. R.* v. *R. R.*, 97 U. S., 491; *Schulenberg* v. *Harriman*, 21 Wall., 44, 60; *Ruthford* v. *Greene's Heirs*, 2 Wheat., 196.

"It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made. When identified, the title would become perfect as of the date of the act. The patent would be evidence of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township and thus render it unnecessary to resort to oral evidence on that subject.

"It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision, was so wet and unfit for cultivation as to carry the whole subdivision into the list. The determination of the secretary upon these matters as shown by the patent would be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title, and a source of quiet and peace to its possessor. But the right of the State under the first section would not be enlarged by the action of the Secretary, except as to land, not swamp or overflowed, contained in a legal subdivision, as mentioned in the fourth section; nor could it be defeated in regard to the swamp and overflowed lands, by his refusal to have the required list made out, or the patent issued, notwithstanding the delays and embarrassments which might ensue.

"The conclusion which the land department reached upon its examination of the character of the grant soon after the passage of the act, was that the title passed to the state at the date of the act. In a communication to the Commissioner of the General Land Office, under date of Dec. 23, 1851, Mr. Stuart, then Secretary of the Interior, referring to the Act of 1850, and the act of 1849, to aid Louisiana to drain her swamp lands, and stating that the first question involved was as to the period when the grants took effect—whether at the date of the law, or at the date of the approval of the selection by the secretary—said, 'in each case, the granting clause, is in the first section, and the words employed, viz.: "are hereby granted," seem to me to import a grant *in præsenti*. They confer the right to the land, though other proceedings are necessary to perfect the title. When the selections are made and approved, or the patent issued, the title therefor becomes perfect, and has relation back to the date of the grant.' And further 'as the grants are construed as taking effect from the date of the laws making them respectively, and as vesting the inchoate title in the states, it follows that any subsequent sale or location of swamp or overflowed lands must be held to be illegal, and the purchase money refunded, or a change of location ordered.' 1 Lester's Land Laws, 549, No. 578.

"This construction of the grant has been followed by the secretary's successors to this day." He continued, page 517:

"The question, therefore, is whether upon the proof thus presented of the segregation of the lands in controversy as swamp and overflowed lands by the authorities of the State of California, and their designation as such lands on a plat of the township made by the Surveyor General of the United States, and approved by him, and forwarded to the General Land Office, pursuant to the fourth section of the Act of 1866, and approved by the commissioner, as shown by its official use; the plaintiff can maintain an action for the recovery of the lands, they never having been certified over to the State, as required by § 2,488 of the revised statutes, or patented to her under the Act of 1850. According to the decisions we have

cited, the holders of the certificates of purchase had a good title to the lands if, in fact, they were swamp and overflowed lands on the 28, of September, 1850.

"The certificates were conclusive as evidence against the State that they were such lands. The statute of California, as already stated, makes them *prima facie* evidence of legal title to the premises in the holders, and upon them ejectment can be maintained in the state courts. The case of the plaintiff was therefore *prima facie* established by the production of the certificates, and showing their assignment to him.

Richter v. *Riley*, 22 Cal., 639.

"The representation of the lands as swamp and overflowed on the approved township plat, would be conclusive as against the United States that they were such lands, if they had not been patented before the return of such township plat to the land office. The Act of Congress intended that the segregation maps prepared by authority of the State and filed in the state surveyor general's office, if found upon examination by the United States Surveyor General to be made in accordance with the public surveys of the General Government, should be taken as evidence that the lands designated thereon as swamp and overflowed were such in fact, except where this would interfere with previously acquired interests. In this case the defendants trace title by patents of the United States purporting to be issued to settlers under the pre-emption laws in 1866, 1867, 1868 and 1871, upon declaratory statements made in 1864, three years after the purchase from the State by the grantors of the plaintiff, and two years after a map segregating these lands had been made by the surveyor of the county, pursuant to the law of the state, and deposited in the Surveyor General's office. These patents were evidence that whatever title the United States then held passed to the patentees and as against a mere intruder, without claim of title from a paramount source, were conclusive that the lands were of the character which by the patents they were represented to be. This was the case of *Ehrhardt* v. *Hogaboom*, 115 U. S., 67." And on page 519:

"But this doctrine has no application where a party, whether plaintiff or defendant, asserts title to premises

in controversy from a paramount source, or by a prior conveyance from a common source." And on page 520.

"The court below held, and placed its decision upon the ground, that, because the Commissioners of the General Land Office, had not certified the lands in controversy to the state as swamp and overflowed, when this action was commenced in 1870, there was no title in the state by the grant of 1850, which could be enforced thus making the investiture of title depend upon the act of the commissioner instead of the Act of Congress; whereas the certificate of that officer, when the previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completness of their segregation. The decision is in conflict with its previous decisions, and with the adjudged cases, to which our attention has been called."

In *Sacramento Valley Reclamation Company* v. *Cook*, 61 Cal., 341, decided as late as 1882, that court recognized the swamp land grant of 1850, as one *in præsenti*.

Its language was. 'It is as well settled as anything can be by the courts that the donation of swamp and overflowed lands by the United States, to the states in which such lands were situated at the date of the passage of the act of September 28, 1850, 'was a grant *in præsenti*, by which the title to those lands passed at once to the states in which they lay, except as to states admitted into the union after its passage,'" citing *French* v. *Fyan*, 93 U. S.. 169.

"For the error in holding that the certificate of the commissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the Swamp Land Act of 1850 took effect. If they are proved to have been such lands at that date, they were not afterwards subject to pre-emption by settlers. They were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the State and after the segregation map was deposited with the Surveyor General of the State, with notice also that they were actually segregated and claimed by the state as such land."

In *San Francisco Sav. Union* v. *Irwin*, 28 Fed. Rep. 708, we find the views of Justice Field, concerning the Swamp Land Grant, which were affirmed by this court in 136 U. S. 578, which we cite as the last language, concerning this subject, affirmed by this court.

"The act is a grant *in præsenti* to each State then in the union, of land situate within its limits of the quality described. Its language is, that they '*shall be, and the same are hereby granted to said state,*' words which import an immediate transfer, and not one in the future. The provisions of the second section, makes it the duty of the Secretary of the Interior, as soon as practicable, after the passage of the act, to make out an accurate list and plat of the lands so described, and to transmit the same to the govenor of the state and on his request, to cause a patent to be issued to the State, and declaring that 'on that patent the fee simple to said lands shall vest in the State' subject to the disposal of the legislature thereof, did not prevent the immediate passage of the title. The patent, with the definite description by metes and bounds, of the lands which it would furnish, would serve a useful purpose. It would render it unnecessary for the State or grantees from the state, to make any further proof of the character of the lands, should any controversies arise respecting it. In many ways doubts might be created on the subject. The evidence might be conflicting, as to whether the greater part of a legal subdivision fell within the description required, as being wet, and unfit for cultivation. In all such cases the patent would solve the doubt, for the determination in that respect of the Secretary of the Interior would be controlling. The ascertainment and designation of the lands as those described, would be conclusive as against collateral attacks; but the title of the State to the lands, they being swamp and overflowed, cannot be defeated nor in any way impaired by the delay or refusal of the Secretary of the Interior to have the required list made and patent issued. The State and her grantees might be embarrassed in the assertion of their rights, but no other consequence would follow."

And in the same case, the objection that the State did not acquire title until the lands had been listed and patented to her by the United States, was overruled; the doctrine of *in præsenti*, requiring that the title must vest, as of the date of the grant, without reference to the details of selection.

In Gould & Tucker's notes of the Revised Statutes of the United States, page 562, it is said the "St. Sept. 28, 1850, effected an immediate grant to the States of the interest of the United States in these lands, which cannot be impaired by the delay or refusal of the Secretary to have the lists made." (Citing cases national and state.)

Att orney General's Opinion.

Attorney General Black held, in 9, Atty. Gen. Opinions, 253, that under the act of Sept. 28, 1850, the grant to the State of Arkansas of the swamp lands within her limits, vested the title in the State before a patent issued; and that a grant made on Oct. 3, 1856 to a railroad, was subject to the Swamp Land Grant.

Secretary of the Interior Decisions.

Commissioner Butterfield Nov. 21, 1850 in issuing a circular containing directions to identify the swamp lands said: "This act clearly and unequivocally grants to the "several states, those lands which, from being swampy "or subject to overflow, are unfit for cultivation."

1 Lester's Land Laws, 543.

Secretary Schurz, said April 19, 1877: 2 Copp's Pub. Land Laws, 1048.

"The legal character of this grant, has often been passed upon by the courts, and it has been uniformly

held, that the act was a present grant in the State *proprio vigore*, from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of the boundaries to make it perfect."

And therefore he held that swamp lands were not, in March, 1853, when the pre-emption laws were extended to California public lands, and for that reason could not be entered and sold under those laws:

"The act of September 28th, 1850," he added, "was notice to all the world, that all of the swampy lands in California were thereby granted *in præsenti* to the State, and were not subject to pre-emption, entry or sale thereafter. And the person who files a declaratory statement on lands actually swampy, does so with full notice that they are not public lands and that he cannot obtain any right thereby."

In 1 Dec. Sec. Int., on page 321, Sec. Teller said;

"The swamp land grant is a grant *in præsenti*, except as to states admitted into the Union after the passage of the act."

Again, Sec. Teller said:

"The act is a present grant, vesting in the State from the day of its date the title to all the swamp and overflowed lands within the state that were then not sold, and requiring nothing but boundaries to make it complete." (2 Dec. Sec. Int., 472 and 645.)

Acting Sec. Muldrow, in 3 Dec. Sec. Int., 476, said:

"The grant under the act of September 28th, 1850, which is extended to the State of Oregon by the act of March 12, 1860, has uniformly been held to be a present grant, vesting an immediate interest in the State to the lands granted. The claim of the State is to be de-

determined by the character of the land at the date of the grant, and if at that date the greater part of each smallest legal subdivision was swampy or overflowed, the land inures to the State under the grant, and if not of such character, the state's claim is at an end."

Justice LAMAR when Secretary of the Interior Feb. 25, 1886, in *Cushing* v. *Michigan*, 4 Dec. Sec. Int., 415, said:

"The principle has been firmly established by the decision of the courts and of this department, that the grant of swamp lands, made to the several states, was a grant *in præsenti*, and conferred a present vested right to such lands as of the date of the grant, and that the field notes of survey may be taken as a basis in determining the character of the land, if the State so elects. If the State does not so elect, they shall then furnish satisfactory evidence that the lands are of the character embraced in the grant. * * * *The right of the State* to each smallest legal subdivision, the greater part of which was swamp and too wet for cultivation, *vested at the date of the grant, and has remained so vested ever since*, and their title to such land is perfected when it is identified."

Secretary Vilas in 7 Dec. Sec. Int., 255, refused to pass upon the question whether accretions were swamp or not, leaving it for the courts to determine. In speaking of the act of Sept. 28, 1850, he said (page 256):

"That act was a present grant and vested the title to all the swamp and overflowed lands of this character within the limits of the state in the State upon its passage. Whether or not a tract of land passed to the State by virtue of that grant, depends simply upon the question, what was the character of the land at the time, as being swamp or overflowed."

See opinion of Secretary Vilas, 8 Dec. Sec. Int., 308, holding the swamp land grant to be one *in præsenti* which we quote on page 104 of our brief.

Arkansas.

In *Fletcher* v. *Pool*, 20 Ark., 100, a bill was filed to quiet title, the complainant having entered the land Jan. 11, 1851, upon which entry a patent issued.

Subsequently the defendant purchased the lands as swamp lands from the State. A bill sustaining complainant's title was reversed on the ground that the act *proprio vigore* vested the title in the State, Sept. 28, 1850, and the patent by the United States was a nullity.

The court (page 102), said:

"The first section of the act grants to the State of Arkansas all the swamp and overflowed lands, made thereby unfit for cultivation, within her limits, for certain purposes mentioned in the act. The second section provides that the Secretary of the Interior shall make out an accurate list and plats of the lands described, and transmit the same to the govenor of the State and at the request of the govenor cause a patent to be issued to the State therefor; and that on that patent, the fee simple to the lands should vest in the State subject to the disposal of the legislature.

"That the act was a *present* grant, vesting in the State, *proprio vigore*, from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of boundaries to make it perfect; no doubt can be entertained.

"The object of the second section, was not to postpone the vestiture of title in the State, until a patent should issue, but was to provide for the ascertainment of boundaries, and to prevent a premature interference with the lands by the state legislature before they were so designated as to avoid mistake and confusion. Where land is granted by legislative enactment, and the grantee is authorized to demand a patent for the land, his title is as much vested as if he had the patent, which is but evidence of his title."

This case decided in 1859, clearly enunciates the principles constantly announced by the United States courts.

In *Ringo* v. *Rotan*, 29 Ark., 56, head note reads: "The title of the State to the swamp and overflowed lands, granted to her by act of Congress of Sept. 28, 1850, accrued from the date of the act, and a title derived from the state, will take precedence over a grant by the United States subsequent to that time." The dates in this case were as follows:

Entry made July 11, 1851, and United States patent issued Aug. 9, 1852, the land was purchased from the state as swamp land; which title was sustained.

California.

Owens v. *Jackson*, 9 Cal., 322 (decided April term, 1858), has the distinction of being the first swamp land decision. The question was whether the State had the right to dispose of the swamp and overflowed lands prior to a patent from the United States. The court held it had, using the following language:

"The first section of the act of Congress provides 'that the swamp and overflowed lands within the State of Arkansas, shall be and the same are hereby granted to said State.' By the fourth section, the provisions of the act are extended to other States in which such lands may be situate. The language of the act is in the present tense 'are granted' and conveyed to the State a present interest in the lands. The lands granted are not described in the act by metes and bounds, but are designated by the description of swamp and overflowed lands. This description is sufficiently certain to give the State a present right.

It is true that the second section of the act of Congress makes provision for the issuing of a patent to the state, 'and on that patent a fee simple to said lands shall vest

in said State, subject to the disposal of the legislature thereof,' but this provision does not conflict with the view we have taken. The Act of Congress describes the lands not by specific boundaries, but by its quality, and is a present legislative grant of all the public lands in the state of the quality mentioned. The patent is a matter of description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive, as to both the United States and the State."

And at the same term of court, the case of *Sommers* v. *Dickinson*, 9 Cal., 554, was decided, in which opinion, Justice Field concurred. The court said:

"The act itself operated as a conveyance. The language of the act is explicit. 'The whole of those swamp and overflowed lands, etc., are *hereby granted to said State.*' And, immediately upon its passage, the State became the owner of the land with absolute power of disposition."

In *Kernan* v. *Griffith*, 27 Cal., 87, head note reads:

"The Act of Congress of Sept. 28, 1850, granting to Cal. the swamp and overflowed lands within the state, vested in said State the absolute ownership of all the said lands then undisposed of, and the title of the state in no way depends upon the issuance of a patent to the states by the U. S. The State of California since Sept. 28, 1850, has had the absolute power of sale of the swamp and overflowed land within its limits. The fact whether a given tract of land is swamp or overflowed or dry land cannot be determined by the decision of the State or the United States, but must be settled by evidence given in the course of judicial proceedings."

In *Sacramento Valley* v. *Cook*, 61 Cal., 341:

The facts were, the lands were listed as swamp lands to the state Dec., 1873. On June 3, 1874, a patent was issued by the United States to the State as swamp lands, and on Aug. 18, 1874, the State issued a patent to respondent Cook. The appellant claimed title under U. S.

patent, issued Aug. 5, 1869, and the swamp land title was sustained.

ILLINOIS.

In *Supervisors* v. *States Atty*, 31 Ill., 68, we find the first construction of the swamp land legislation in Illinois. Breese, J., on page 78 said:

"By the grant of those lands to the State, a fee simple estate passed, clogged by no condition. The State became the absolute owner of the lands, with power to dispose of them in such manner and for such purpose as to the State might seem most expedient. The language of the grant is, in the first section, 'shall be and the same are hereby granted to the State.' This is a full and perfect grant of an indefeasible estate."

The Supreme Court of Illinois receded from the position, that the swamp land grant was a grant *in præsenti*, but held that it required a patent, as provided in the second section, before the lands passed, in *Grantham* v. *Atkins*, 63 Ill., 359, and in *Thompson* v. *Prince*, 67 Ill., 281, but overruled said cases, and returned to its earliest opinion in *Kelley* v. *Brickey*, 78 Ill., 133. In which case the plaintiff in ejectment claimed, under United States patent dated Aug. 15, 1860, and the defendant under a deed from the county, as swamp lands, dated Jan. 29, 1862; (on p. 135,) the court said:

"The tract in question being of the description embraced in the act of Congress of Sept. 28, 1850, it became at that date the absolute property of the State subject to its control, and in which the Government of the United States, thenceforward, had no interest, and could not sell it to another.

That this doctrine is clearly established by the case of *Railroad* v. *Smith*, 9 Wall., 96, where the subject is fully discussed, that these lands so granted to the states, were by various acts of the legislature vested in the counties

in which they are situate, appears by the acts cited, and by the last act passed on the subject approved Feb. 14, 1859. (Ill. Laws, 1859, p. 201.)

Whatever this court may have decided in respect to the condition of the title to these lands, the Supreme Court of the United States, whose prerogative it is to construe acts of Congress, must be regarded as authortative on this question. That court having decided that by the terms of the act of Sept. 28, 1850, the title to those lands vested *ipso facto* in the State, the State, having competent authority, passed the title to the counties."

In *R. R.* v. *McDougal*, 113 Ill., 603, we find the latest swamp land case in Illinois, in which the doctrine of the grant being one *in præsenti*, is re-affirmed. The court said, page 605:

"The land is swamp land granted by the govern-
" ment of the United States to the State of Illinois by
" the Act of Congress, approved Sept. 28, 1850, and by
" the State of Illinois to Menard county by the act of the
" General Assembly of 1852, p. 178, section one; where-
" by the State grants directly to the counties of the State
" respectively, all swamp and overflowed lands which lie
" within the same, that were granted to the State by said
" act of Congress, and the act of 1854, (Ills. laws 1854,
" p. 21, Sec. 12) re-affirms the grant of these swamp and
" overflowed lands by declaring that they are hereby
" granted to and invested in the several counties, in which
" they were situate."

Indiana.

In *Edmondson* v. *Corn*, 62 Ind., 17, the court held, the swamp land act was a grant *in præsenti*, and refused to concur in the contention that the State of Indiana could have no title to swamp lands until the United States con-

veyed them to the State by patent, and held that the act by its own force, conveyed the title to the State.

In *State* v. *Portsmouth Sav. Bk.*, 106 Ind., 435, in a very careful opinion which reviewed the authorities, on p. 445, the court says:

"The correct doctrine to be gathered from the foregoing cases and especially from the decisions by the Supreme Court of the United States, which are authoritative upon the construction of Federal statutes, seems to be the following:

"1. The Swamp Land Act of 1850, *ex proprio vigore*, was a grant *in præsenti* to the States, of all the swamp lands therein situated.

"2. Whether or not any particular tract of land was or is swamp land within the terms of the grant, was and is a question for the decision of the Secretary of the Interior.

"3. His decision upon that question, when once made, is final and conclusive, and cannot be questioned or overthrown by evidence.

"4. It is not necessary that the decision of the Secretary of the Interior, that any particular tracts of lands were or are swamp lands should be evidenced by a patent to the State. It is sufficient that the lands have been selected as such, and the selection approved by that officer.

"5. When such selection has been approved by that officer and the particular tracts of lands thus identified as swamp lands, it relates to the date of the grant, namely, Sept. 28, 1850.

"6. A patent to the State for swamp lands, issued by the Secretary of the Interior, is evidence that the designated tracts were properly selected as swamp lands, and

"fixes the title thereto as of the date of the swamp land "act, namely, Sept. 28, 1850.

"7. If the Secretary of the Interior has not designated "any particular tract as swamp land, and has not decided "to the contrary, and refuses to act in the premises as "against wrongful claims, it may be shown by evidence on "behalf of the state, or one claiming under it, that the "land is in fact swamp land. This results from the neces- "sity of the case, as the courts have no power to compel "action by that officer.

"8. While it may be that the State, in the absence of "some statutes of its own to the contrary, might have its "rights to and interest in any particular tract of land be- "fore it is segregated as swamp land, and such segregation "approved by the Secretary of the Interior, the title of "such grantee would be liable to be defeated by a decision "by that officer that such land was not or is not swamp "land within the meaning of the swamp land act of 1850."

Iowa.

In *Allison* v. *Halfacre*, 11 Iowa, 450, the head note reads:

"The Act of Congress granting swamp lands to the State of Iowa operated *ex proprio vigore*, to convey the title to the State. The subsequent selection and patenting of the lands were necessary only for the purpose of fixing their location and description."

Michigan.

See the opinion of Judge Cooley, quoted on page 58 of our brief.

MISSISSIPPI.

In *Fore* v. *Williams*, 35 Miss., 533, (decided 1858), in ejectment, the plaintiff, gave in evidence a patent from the state dated March 20, 1855, and a certificate that the Secretary of the Interior had approved the list of lands as swamp lands Jan. 31, 1855. The defendant offered a register's receipt, dated Nov. 3, 1854, and the court held, the swamp land title should prevail. After citing the act of Congress, the court said (on page 537):

"There cannot be a doubt that this was a legislative grant vesting the absolute title in the State to the lands referred to as fully and completely as if the act had designated the lands by specific description. The grant is explicit and absolute, taking effect upon all the lands referred to, from the date of its passage, for it provides that all the lands then remaining unsold are granted to the State by the act itself. If nothing further had been said, there would then be no doubt upon the subject, what then, was necessary, in order to enjoy the benefit of the grant, nothing, but to locate the lands as swamp and overflowed lands, and thereby render the subject of the grant certain. *Rutherford* v. *Green*, 2 Wheat., 196, and that was done by the second section of the act. That could have been the only object of that section, which provides the mode in which the land should be ascertained. To render that certain, which under the first section was uncertain as to location and appropriation.

The provisions in the second section were, after the ascertainment of the lands embraced by the act, a patent should issue for them to the State at the request of the governor 'and on that patent that the fee simple in said lands shall vest in the State,' cannot impair the title previously granted absolutely to the State, by the first section of the act, for, according to technical rule, when there are two clauses in a grant, repugnant to each other, the former will prevail, and the latter will be rejected, nor can it be taken to be a condition annexed to the previ-

ous grant, for such a construction would do violence both to the express language of the first section, and to the manifest object of the act. This is clear, when we consider, that the first section is in terms a present grant, and that it vests, in the State, the lands remaining unsold at the time of its passage. And it is not to be supposed from the nature of the subject-matter, and the terms of the grant, that anything further was intended to be done in order to consummate the grant. The provision under consideration must therefore be regarded either as repugnant to the previous grant, or as superfluous in porviding for the mode of vesting the title, which had already been granted, and in either case, it cannot impair the title previoulsy vested. If this view of the subject be correct, it follows, that no patent was necessary to convey the land to the State."

In *Daniel* v. *Purvis*, 50 Miss., 261, the facts were an entry March 7, 1856, and purchase of swamp land from state Jan. 15, 1857. Simrall, J., said, (p. 263):

"The act of Congress grants immediately to the State the swamp and overflowed lands, of which no disposition had before that time been made. The words in the act 'are unsold.' * * * The grant has been construed to take effect presently, and therefore a purchaser from the State gets a title which relates back to the date of the grant by Congress, and must prevail over any purchaser from the United States subsequent thereto."

Missouri.

In *Campbell* v. *Wortman*, 58 Mo., 258, the court said:

"The decision in this case rests entirely upon the question whether the act of Congress of 1850 to enable the State of Arkansas and other states to reclaim swamp lands within their limits, conferred a present or vested grant of the lands to the State in which they were situated, or whether some further and ulterior action upon the part of the government officers was necessary to render the grant effective. * * * When the act took

effect, it vested the title to the lands in the State, and the power of disposal by the general government was gone. If its officers, by inadvertence, again sold and conveyed the land, the purchaser under them would take no title, because the government had no title to convey."

OREGON.

In *Gaston* v. *Stott*, 5 Or., 48, head-note reads:

"The act of Congress of Sept., 1850, was extended to Oregon by the act of March 12, 1860. The grant was *in præsenti*, and passed a fee-simple title to the State of all the swamp and overflowed lands within her borders.

"The patent provided for in the second section of the act of 1850, operates merely as a further assurance of the title.

"The State has a right to make selections and dispose of the swamp and overflowed lands acquired under the grant before the issuing of the patent by the general government."

In *Miller* v. *Tobin*, 16th Pac. Rep., 161, is a well considered case, in which all the authorities, showing the swamp land act to be one *in præsenti*, are collected, and it held that the right form of action to maintain a swamp land title, was by ejectment and not by bill in chancery.

The plaintiff claims that by force of the swamp land grant, the title to the land in controversy passed on the date of such grant, Sept. 28, 1850, to the State of Illinois, and that this result was accomplished because such act was a conveyance *in præsenti*. We claim that under and by force of the same principles, that the act of the legislature of the State of Illinois, of June 22, 1852, by its first section conveyed the title to the County of Cook, on that date.

The language used in the act of Congress was followed in the act of the Illinois legislature, and the construction put upon the act of Congress must also be placed upon such act of the legislature.

If this doctrine of *in præsenti* be applied to the facts of the record, all other questions are eliminated.

The title of Cook County to the land in dispute exists as of September 28, 1850, and the title of defendant was not earlier than October 20, 1853.

The older title of the plaintiff must prevail.

We urge that this court will concur with us, in the principles of *in præsenti*, and if so, the keeping in mind of this doctrine, and its proper application, will vest the title to this land in the County of Cook, and hold it there, to be recovered in this suit in ejectment.

III.

The certificate of the commissioner of the general land office that the land in question had been selected as swamp land by the State of Illinois, through its agents, and approved by the United States Surveyor General, and so reported to the general land office, was evidence of title.

And such selection and report vested the title in the State of Illinois without patent.

Martin v. *Marks*, 97 U. S., 345.
County of Piatt v. *Gumley*, 81 Ill., 350.
Jasper Co. v. *Wadlow*, 82 Mo., 172.
Fremont County v. *R. R.*, 22 Ia., 91.

The Surveyor General acted under Act of Congress of April 29, 1816. (3 Stats., 325.)

Immediately after the passage of the act Commmissioner Butterfield, November 20, 1850, issued a circular of instruction containing the following:

"You will please make out a list of all the lands thus granted to the State. * * * The only reliable data in your possession from which these lists can be made out, are the —— notes of the surveys on file in your office; and if the authorities of the State are willing to adopt these as the basis of those lists, you will so regard them. If not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them." 1 Lester's Land Laws, 543.

In pursuance of this letter, the legislature enacted June 22, 1852 (§ 5 Ill. Laws, 1852, p. 178 and Gross Ill. Stats., 730) as follows:

"It shall be the duty of the surveyors in the several counties in this state, who have surveyed the said swamp and overflowed lands in their respective counties, to make out plats of all the swamp and overflowed lands in the several townships and fractional townships within their counties, noting distinctly upon the same every tract or parcel of swamp and overflowed land in each township, the quantity and quality thereof, as to whether the same is first, second or third rate; and it shall be his duty to return the same, as soon as practicable, and in reasonable time, to the clerk's office of the county court, and the said court, at the next regular term, thereafter, or sooner if deemed necessary, shall fix a valuation upon each tract according to its quality; but in no case shall any of said land be valued at a less price than ten cents per acre; and the said plat, with the description and valuations marked thereon, shall be recorded in said book, and filed away among the records of the office. *Provided*, that in case of the death or refusal to act of any such county surveyors, the said courts may employ any other suitable person or persons to perform the duties aforesaid."

This certificate shows compliance with this statute. It says (Rec., 8) that John Van Horn acted for Cook County as state agent, and made the original selection, and adds:

'That I have carefully compared the same with the field-notes, township plats and other evidence on file in this office, and am satisfied the greater part of each forty acre tract * * * is swampy or subject to overflow within the meaning of the act of Congress of September

28, 1850, and that said lands rightfully enure to the State of Illinois under said act."

It thus became the policy of Illinois to have her county surveyors select swamp lands by an actual examination in the field, which was platted and spread of record.

This land and most of Illinois had been surveyed previous to this act when the surveyor only noted bodies of water and not swamp and overflowed lands.

A further explanation as to how these lists were to be made is embraced in the letter of the commissioner of the general land office dated January 22, 1858.

1 Lester's Land Laws, 559.

This action is ratified by the Supreme court in *R. R.* v. *Fremont Co.*, 9 Wall., 90.

Martin v. *Marks*, 97 U. S. 345, where the evidence offered was a certificate showing the lands to have been swamp lands certified to by the commissioner of the general land office, almost identical with the evidence offered in this case. MILLER, J., in commenting upon such evidence, (page 346), said:

"Neither this certificate nor anything in the record shows precisely when this list was filed in the General Land Office at Washington. * * * We held in previous cases, that when the lands were identified by proper authority, the title related to the date of the grant, namely, Sept. 28, 1850, and superseded any subsequent grant or evidence of title from the United States."

In *San Francisco Sav. Union* v. *Irwin*, 28 Fed. Rep., 708, FIELD, Justice, in commenting upon the decisions in *Railroad Co.* v. *Smith*, 9 Wall., 95, and *French* v. *Fyan*, 93 U. S., 169, said (on page 711):

"The result of these two cases in the Supreme Court is this: That whenever the Secretary of the Interior has

certified the list required by the act of 1850, and issued the patent, his determination is so far conclusive as to the character of the land, that it cannot be collaterally attacked. But where he has failed to make such list, and issue the patent, it is competent for the state, or parties claiming from her to prove by parol testimony that the land is of the character mentioned in the act of 1850, which passed to her."

And, an objection to the acquisition of any title by the State until the lands had been listed and patented to her by the United States, was overruled.

In Gould and Tuckers notes of R. S. U. S., 562, it is said:

"When the secretary has acted, his determination as to the character of the land cannot be collaterally attacked; but where he has not acted the character of the land may be shown by parol."

By section 891 of the Revised Statutes of the United States, copies of any records, books or papers in the general land office, duly authenticated by the seal and certified by the commissioner thereof, are made evidence equally with the originals thereof.

R. R. Co. v. *Smith*, 41 Mo., 311.

IV.

The certificate of the State Auditor established a prima facie title in plaintiff to the land.

This certificate is found on page 9 of the record. It shows that the lands in question were duly selected as swamp land. That the Secretary of the Interior May 8, 1866, made a formal approval of their selection.

The statute of Illinois passed March 4, 1854, (§ 8 Ill.

Laws 1854, p. 21, and Gross Ill. Stats., 735) by its eighth section expressly made such certificate evidence. It reads as follows:

"The evidence of title from the general government, of the swamp and overflowed lands granted to this state by act of Congress of September 28, 1850, shall be filed in the auditor's office, and as soon as practicable thereafter, the auditor of public accounts shall cause to be made out, for each of the several counties, a correct abstract or list of said lands, the correctness of which list shall be certified to by the said auditor, with the seal of his office attached thereto, and the list so made out shall be sufficient evidence of the title of the lands therein described; said lists shall be forwarded by mail or other safe conveyance to the clerk of the county court of the proper county, and upon the receipt of such lists the said clerk shall file them in his office, and shall cause them to be recorded in a proper and well bound book. The list conveying the land as aforesaid shall have the same force and effect as patents issued for school lands, and duly certified copies thereof shall be received in all courts, and have the same force and effect as the original lists so filed and recorded."

Section 9 of the same act provides that the "auditor shall cause the lists or patents received from the general government to be recorded in a well bound book; and that abstracts or diagrams certified by him shall be evidence of the facts therein stated."

In *Dart* v. *Hercules*, 34 Ill., 395, the court, after explaining that the swamp land grant was a present grant, said (on p. 403):

"This act fully vested the legal title of such lands as were selected and appropriated under its provisions in the State; government may pass title to its property by enactment as effectually as by a patent. When it is transferred in the latter mode, it is in pursuance of authority conferred upon a commissioner or agent appointed in pursuance of legislative enactment. Such agent only exercises the power conferred and in the mode prescribed by the enactment. Such a law, in that case, is the foundation of the title, and operates as a deed or power of attorney, from the government to the agent; and if the government may confer the power upon an agent to convey, why not by enactment transfer the title to a purchaser or donee?"

And the court held, there was no force in the objection that no title passed without producing a patent from the United States government to the State of Illinois for the premises, and the court continued:

"The act of our legislature, entitled: 'An act to dispose of swamp and overflowed lands, and to pay the expenses of selecting and surveying the same,' adopted at the session of 1852 (Ill. Laws, 178), and the amendatory act of 1854 (Ill. Laws, 21) declares the evidence of title of the state shall be filed in the auditor's office, and that he shall cause to be made out for each of the several counties, a correct abstract or list of such lands; the correctness of which he is required to certify under the seal of his office; and it is provided that the lists so made, shall be sufficient evidence of the title of the lands therein described. The list is required to be filed in the county clerk's office of the proper county and to be recorded. It is also declared that this list shall have the same force as patents issued for school lands, and duly certified copies of the same shall have the same force and effect as the original lists so filed and recorded. The production, then, of a duly certified copy of the list recorded in the county clerk's office, was under this enactment, all that was required to show title in the state and county, and has the same force as a patent from the state for school lands."

Bristol v. *Carroll County*, 95 Ill., 84.

In *County of Piatt* v. *Gumley*, 81 Ill., 350, in an ejectment suit *the auditor's certificate similar to the one offered in this case, was held sufficient evidence of title under the swamp land grant.* In that respect the case is on all fours with the one at bar, and conclusive.

V.

The act of Congress of March 3, 1857 (11 Stats., 251,) was a further assurance of title and confirmed as of Sept. 28, 1850, the title to the land in question to the State.

SWAMP LAND LEGISLATION.

Since the passage of the Swamp Land Grant Sept 28, 1850, the following acts of Congress relating to this subject have been passed that relate to Illinois, which we quote in full. Before doing so we wish to state our views concerning them.

In this Court it has passed beyond the ground of controversy that the act of Sept. 28, 1850, (9 Stats., 519,) was a present absolute grant vesting the title in fee simply in the State of all its swamp lands unsold on the date of its passage.

If the title to the swamp land vested in the State, and we have shown it did, such title could not be divested or modified by subsequent legislative enactment.

The title once parted with the United States had no longer any authority or control over it. The government Swamp Land Grant is precicely the same as the deed, the grant, of an individual.

The title being granted, the grantor has lost his title and can no longer exercise control over it. Another deed conveys no title because it is already conveyed.

So of the acts of Congress passed after the Swamp Land Grant of Sept. 28, 1850; if they attempted to convey or confirm title they could not do it, because the United States had already parted with such title by the original Swamp Land Grant.

The United States having no title in the subject-matter, the swamp lands, could not give a further assurance of title or modify the title already conveyed.

And Congress, having granted the title, could not undo its grant nor attach conditions not attached at the time it was granted.

The foregoing constitutional principles constitute a part of the foundation of our constitutional governments.

The acts of Congress, then, which we cite, if they attempted to change or divest the title to swamp lands, under the grant of Sept. 28, 1850, would be unconstitutional and void. If they merely indicate a policy and point out a mode of action which may be proper with the consent of the party in whom such title exists, then their political purpose is apparent and has been accomplished. These acts have other useful purposes, as identifying the lands and causing evidence of title to issue, etc., which we need not point out.

The first act, after the grant; was passed March 2, 1855. (10 Stats. 634.)

"AN ACT for the relief of purchasers and locators of swamp and overflowed lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States cause patents to be issued, as soon as practicable, to the purchaser or purchasers, locator or locators, who have made entries of the public lands, claimed as swamp lands, either with cash or with land warrants, or with scrip, prior to the issue of patents to the State or States, as provided for by the second section of the act approved September twenty-eight, eighteen hundred and fifty, entitled 'An act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits,' any decision of the Secretary of the Interior, or other officer of the government of the United States, to the contrary notwithstanding: *Provided*, That in all cases where any state, through its constituted authorities, may have sold or disposed of any tract or tracts of said land to any individual or individuals prior to the entry, sale or location of the same, under the pre-emption or other laws of the United States no patent shall be issued by the President for such tract or tracts of land, until such state, through its constituted authorities, shall release its claim thereto in such form as shall be prescribed by the Secretary of the Interior: *And provided further*, That if such state

shall not, within ninety days from the passage of this act, through its constituted authorities, return to the General Land Office of the United States a list of all the lands sold as aforesaid, together with the dates of such sale, and the names of the purchasers, the patents shall be issued immediately thereafter, as directed in the foregoing section.

SEC. 2. *And be it further enacted*, That upon the proof, by the authorized agent of the state or states, before the commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the act aforesaid, the purchase money shall be paid over to the said state or states; and where the lands have been located by warrant or scrip, the said state or states shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry, at one dollar and a quarter per acre, or less, and patents shall be issued therefor, upon the terms and conditions enumerated in the act aforesaid: *Provided, however*, That the said decisions of the commissioner of the General Land Office shall be approved by the Secretary of the Interior."

This act was unconstitutional and void if it sought to divest the swamp land title in the States and to transfer it to purchasers from the United States since the passage of the original grant. If it only pointed out a way to adjust such conflicts of titles, as existed because the boundaries were not defined and purchases had been made of the government of these swamp lands when they should have been made of the State, not intending to transfer title without consent of the owner it was proper practical legislation and served a useful political purpose.

That is such provisions of the act as sought to divest vested rights or impair the obligation of the grant would become unconstitutional.

In *Busch* v. *Donohue*, 31 Mich., 482, Cooley, J., said: "This is a controversy between claimants under conflicting grants by the United States. The lands which are the subject of the litigation were swamp lands, and the plaintiffs claim is that they were conveyed to the State by (9 Stats., 519.) That act by its first section provided that the whole of the swamp and overflowed lands made unfit thereby for cultivation and remaining unsold, '*shall be and the same are hereby granted*' *to the States in which they are situate.* By the second section it was made the duty of the Secretary of the Interior to prepare and

transmit to the government accurate lists and plats of the land, and at the request of the governor to cause a patent to be issued to the state therefor, and it was further provided, that 'on that patent the fee simple to said lands shall vest' in the State.

The question of law in the case relates to the time when the title actually vested in the State under the act referred to, if it ever vested at all. Lists of swamp lands, including the parcel in dispute, were made and duly approved by the Secretary of the Interior, June 25, 1853, but the patent was not issued until Feb. 12, 1855. Meantime on Sept. 15, 1853, the defendant had entered the land at the land office in Detroit, as being still the property of the United States, and on June 15, 1856, he obtained a patent on this entry. The plaintiff purchased the land of the state on a day still later. This statement shows that the land in question was set apart as swamp lands before the defendant entered it and that it was patented to the State before it was patented to the defendant. The defendant relies however, on the act of Congress 'for the relief of purchasers and locators of swamp and overflowed lands' approved March 2, 1855, which directed the president to cause patents to be issued to purchasers and locators who had made entries of the public lands claimed as swamp lands prior to the issue of patents to the states, and made provision for compensating the states for any lands they might lose in consequence. (10 Stats., 634.) *If title to the land in question was vested in the state previous to the passage of this act, it can scarcely be claimed that anything done under the act could divest it. A grant by Congress to a State is no more subject to be recalled at the will of Congress than a grant to an individual.*

Recurring to the act of 1850 it will be seen that the words import a present grant to the State. The swamp and overflowed lands it says 'shall be and the same are hereby granted' to the states. If the lands intended had at that time been properly identified in any manner it would be difficult to contend that the act did not operate at once as a present conveyance. In *Railroad Co.* v. *Smith*, 9 Wall. 95, where the controversy was between a purchaser of swamp lands from the state, and a railroad company to which a grant had been made with an excep-

tion of the lands previously granted to the state by the act of 1850, it was decided that swamp lands were excepted from the grant to the railroad company, although they had not yet been designated by the Secretary of the Interior, the grant to the state being a grant *in præsenti*. And in *Railroad Co.* v. *Fremont County*, 9 Wall, 89, it was held that when the swamp lands had been properly designated in the lists which the act contemplated, they became withdrawn from market, and were no longer subject to private entry. In other words, that the grant to the state made *in præsenti* by the act of 1850, had been made definite and certain in its application to particular parcels granted, by the lists which described and pointed them out. A subsequent patent might be convenient as an evidence of title, but it could not be necessary, for the act itself, when the lands were properly identified, was as effectual to transfer the title as any instrument it was in the power of the government to give."

* * * * *

"It was intimated on the argument that the defendant was a pre-emptioner, and had acquired rights as such previous to the entry. The record does not show the fact, and if it did, it is not seen that the legal title would be affected. The decisions are that pre-emption claims do not preclude the government from disposing of the land until the pre-emptioner shall have made payment for the land. (*Frisbie* v. *Whitney*, 9 Wall., 187. *Hutchings* v. *Low*, 15 Wall., 77.)"

In *Branch* v. *Mitchell*, 24 Ark., 431, the court, (on p. 443), said:

"This court has already repeatedly decided that by the words of the act of Sept. 28, 1850, all the lands in the state which were swamp and overflowed, and thereby unfit for cultivation, immediately passed to and vested in the State. The question is no longer an open one. That grave inconveniences might result to the State and individuals, and distressing conflicts of title from the doubtful character of much of the land in the state, was a consideration to be duly weighed by the court in determining the meaning of the grant, and it has been duly considered, and, also; it was, and is, a consideration of no small moment, that the Congress of the

United States by the Act of March 2, 1855, virtually decided that the grant was not *in præsenti*, since they ordered that patents should issue to purchasers of such lands, on purchases made after the grant, 'any decision of the Secretary of the Interior or other officer of the government of the United States to the contrary notwithstanding.' So explicit a declaration of opinion by the Congress invoked for the consideration of the question careful consideration and great deliberation. Yet the Congress at the same time admitted the validity of any sale made of such lands by the state prior to the entry, location or purchase of the same, under the laws of the United States; though such sales were ordered to be disregarded if the state should not, within ninety days, furnish a list of the lands so sold.

"*Whether the lands falling within the terms of the grant had or had not vested in the State under the act, was a judicial question, which Congress had not the right to take upon itself to decide.* And it is but respectful to that body to suppose that it was simply the intention of the act to give purchasers their patents, so that the claimants under the state might institute proceedings in equity to establish their titles, and avoid the patents. However that may be, we continue satisfied with the decisions heretofore made, and again hold; that all the lands in the state, which were really and in fact swamp and overflowed, and thereby unfit for cultivation, passed to and vested in the State Sept. 28, 1850. The case is the same as if the grant had been of all the prairie land, or all the wood land, or all the alluvial land, in the state; the diffculty of ascertainment of its character not affecting the question.

The words of the grant, the operative words, are direct and positive "*shall be, and the same are hereby granted to the State.*' And the provision of the second section, that the Secretary of the Interior should make out and transmit to the governor a list and plats of the land described, and at the request of the governor, cause a patent to issue to the State; and that 'on that patent the fee simple to said lands shall vest in the said State' can no more be held to limit the effect of the present grant in the first section, than if in a deed after immediate and express conveyance of lands by some general description, it should be provided, that

when the number should be ascertained, another deed should be made 'on which the fee simple should vest.' This would make the title of the State to any of the land depend on the request of the governor for a patent. The words of the second section must be held to be simply a definition of the nature of the title which the State took under the grant, and not a postponement of the period at which the title should vest.

It is quite true that 'where grants are made under descriptions so vague and indefinite, that neither the grantee, nor any other can tell their location, or boundaries until the grantee does some act which locates and defines them, if another grant, strictly defined, intervenes, the first grantee may lose what he would have been entitled to, if his own grant had been descriptive and definite.' The cases decided by the Supreme Court of the United States, 'where one had a claim unlocated on a large section of country, which might be located by survey at any spot not appropriated by an individual title,' in which it has of course been held that 'if any other person afterwards obtained a grant by specific boundaries, within the limits wherein the prior grant was to be located, the title of the latter grantee could not be impaired by any subsequent survey of the former,' are far from deciding this case. Such were *U. S.* v. *Forbes*, 15 Pet., 184; *U. S.* v. *King*, 3 How., 736; *Glen* v. *U. S.*, 13 How., 250; and *Fremont's case*, 17 How., 558.

No doubt the land granted must in some way be severed from the public domain. If the grant were of all the lands below high water mark on the Arkansas and Red Rivers, they would be sufficiently 'severed from the public domain,' no matter how much trouble and difficulty it might cost to ascertain them. The definition of the lands in this case, as well as that, is distinct and certain enough, though mistakes may be made in deciding on the question of fact. Whatever can be made certain is certain.

The position of the learned counsel, that even if the land did pass by the grant, it did not relieve the State of the necessity of getting it located and confirmed as swamp land; and, that from the time of the grant until this was done by her, the United States did not obligate itself not

to sell the lands to any one else, needs no serious refutation. The act making the grant did not require the State to do any act at all, except through her governor to demand the patent; and it can hardly be seriously contended that it the Secretary of the Interior, in making out the lists omitted half the lands in the state, which were really swamp and overflowed lands, unfit for cultivation, the State must lose them and would not take them under the grant.

If the lands in question passed to the State by the grant, the United States no longer owned them, and of course could not sell what was no longer her own. That the State was a donee, and Jordan, a purchaser, has no place here. A title parted with on any valid consideration, is gone forever; and reference to the distinction between executed and executory contracts is a misapplication of principle and doctrine."

Confirmatory Act.

The confirmatory act was passed March 3, 1857 (11 Stats., 251), and reads as follows:

"An Act to confirm to the several States the swamp and overflowed lands selected under the act of September twenty-eight, eighteen hundred and fifty, and the act of the second of March, eighteen hundred and forty-nine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the selection of swamp and overflowed lands granted to the several States by the act of Congress approved September twenty-eight, eighteen hundred and fifty, entitled 'An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits,' and the act of the second of March, eighteen hundred and forty-nine, entitled 'An act to aid the State of Louisiana in draining the swamp lands therein,' heretofore made and reported to the Commissioner of the General Land Office, *so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States*, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress, entitled 'An act for the relief of purchasers and locators of swamp and overflowed lands,' approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage."

When this act was passed the land was vacant. (Rec., 22.) The lists had been filed, and the entry of Eagan, at least on its face, was canceled.

Such facts brought this land within the language of the confirmatory act. A member of Congress voting for the act, after an examination of the records at Washington, finding the Eagan entry canceled by consent, and finding that the land, though within the six mile limit was listed as swamp lands, would have thought that his vote for such act vested the title in the County of Cook. As he would have thought then so we think now.

This act had for its object, as shown on the face of the bill, and which is established and consistent with cotemporaneous evidence, to identify the lands in the lists of swamp lands as of the character contemplated by the grant. The act also placed the lands in such lists beyond the power of being questioned as being swamp lands by the legislative, the executive or the judicial power of the government.

If it be said it was appropriated by the attempted Eagan entry October 20, 1853, we answer there could have been no appropriation of it because the government had ceased to own it.

When the government granted the land it ceased to have any power to appropriate it.

In the land laws the word "appropriated" means nothing more than an application of the lands to some specific use or purpose, *by virtue of law, and not by any other power.*

McConnell v. *Wilcox*, 1 Scam., 360.
Wilcox v. *Jackson*, 13 Pet., 5–12.
Jerome v. *Ross*, 7 John. Ch., 315.

In the sense of a further assurance we claim that this act confirmed the selections of swamp lands which had been theretofore made and reported to the General Land Office, which, at the date of the act, remained vacant and unappropriated and not interfered with by an actual settlement.

American Emigrant Co. v. *R. R.*, 47 Ia., 515.
Smith v. *Goodell*, 66 Ill., 450.
Funkhouser v. *Peck*, 67 Mo., 20.

The land in question was reported to the general land office Oct. 29, 1853; it was vacant and unoccupied up to 1870, so it came within the operation of the act.

Martin v. *Marks*, 97 U. S., 345.

If it operated upon the lists of swamp lands, it eliminated the question of "the six mile limits," and put the question of their being swamp lands beyond controversy.

Besides the act of 1855 only contemplated cases where the parties were entitled to a patent at the passage of the act. Eagan was not then, nor did he at any time thereafter become entitled to a patent for this land.

The Eagan entry was canceled by the Commissioner of the General Land Office on the 10th of Aug., 1855, and was in that condition when this confirmatory act was passed.

The commissioner had full authority to do this under Sec. 2450 of the Revised Statutes of the United States, which section had been the law since August 3, 1846.

Consequently this land was in no sense appropriated, nor understood to be appropriated by the makers of the statute when it became a law March 3, 1857.

The government considered this action final, and all parties acquiesced in it, for the government permitted the land to be entered by Bunn May 27, 1870, and a patent issued upon such entry Nov. 15, 1873, to Bowen, his assignee, under which the defendant took title.

Sec. Noble, April 1, 1889, 8 Dec. Sec. Int., 387, held that a list of swamp land selections filed and finally rejected prior to the passage of the act of March 3, 1857, was not confirmed by that act because at the date of its passage such list was rejected.

So here the canceled certificate was not within the contemplation of the confirmatory clauses of the act, but the list of swamp land was.

Secretary Teller, November 22, 1883, in 2 Dec. Sec. Int., 653, said: "Although lands may have been approved to the State of Louisiana under a survey originally erroneous * * * yet it having been properly approved * * * and certified to the State—*which was equivalent to patent*—the United States became divested of its title and has no further ownership in, or control over such lands. The title of the State to such lands must therefore remain undisturbed until set aside by due course of law."

So we claim here that the act of March 3, 1857, acted upon the lists of swamp lands as it stood, free from any complication of the canceled entry.

Such canceled entry was regarded as canceled, and the title in the lists of swamp land confirmed in plaintiff.

In *Martin* v. *Marks*, 97 U. S., 346, Miller J., said p. 347:

"It seems that after the passage of the swamp-land grant, this failure of the secretary to act had become a grievance for which Congress deemed it necessary to provide a remedy, by the act of March 3, 1857, (11 Stat. 251) which declares that the selection of swamp and overflowed land, granted to the states by the act of 1850,

and heretofore made and reported to the commissioners of the general land office, so far as the same shall remain vacant, and unappropriated, and not interfered with by actual settlement under any existing law of the United States, be, and the same are hereby confirmed, and shall be approved and patented to the states in conformity to the provisions of said act.

If the paper signed by the surveyor general dated May 18, 1852, (which was a selection of the land as swamp land by the surveyor general of Louisiana) was on file in the general land office at Washington, March 3, 1857, we have no doubt that the act completed and made perfect the title of the State of Louisiana to the land in controversy.

If this were so the title of the plaintiff below was superior to the patent issued subsequently to the defendant, for after the passage of that act, the land department had no right to set aside the selections. The approval of them, and the issue of patents to the state were ministerial acts, in regard to which that department had no discretion, unless *it was found that the lands were not vacant, or had been actually settled on adversely to the swamp land claim.* The act of 1850 was a present grant, subject to identification of the specific parcels, coming within the description; and the selections confirmed by the act of 1857, furnish this identification, and perfected the title."

In *Masterton* v. *Marshall*, 65 Mo., 94, in ejectment, the plaintiff claimed by virtue of a location and settlement made in Aug. 1856, under the pre-emption laws of the United States, under an entry in June, 1857, and a patent Aug. 5. 1873. The defendant claimed title under a purchase from the county of Carroll, in July, 1868, and a deed from the State Feb. 12, 1869, and the swamp land title was sustained. The court, after showing that the swamp land grant was one *in præsenti* (on p. 99), said: "On March 2, 1855: Congress passed an Act for the relief of purchasers and locators of swamp and overflowed lands, which directed the President of the United States

to cause patents to be issued to the purchasers and locators who may have made entries of the public lands claimed as swamp lands prior to the issue of patents to the State, as provided in the second section of the Act of Sept. 28, 1850. This Act further provided for payment to the State of the purchase money received before the United States therefor upon making due proof by the Commissioner of the General Land Office that any of the lands purchased were swamp lands within the true intent and meaning of the Act of 1850. On the 3d of March, 1857, Congress passed another Act, continuing in force the foregoing Act, and extending its provisions to all entries and locations of land claimed as swamp lands made since its passage, and as selections of swamp and overflowed lands had in many instances been made by the State before the required lists and plats were made by the Secretary of the Interior, the Act also declared that all such selections theretofore made and reported to the Commissioner of the General Land Office, so far as the land selected remained vacant and unappropriated and not interfered with by actual settlement, under some law of the United States, were by said act confirmed. We are not aware of any decision of the Supreme court of the United States, which determines the precise scope and effect of the foregoing acts, and it is unnecessary for us in the present case to undertake to define the limits of their operation. It is conceded by the plaintiff's counsel, to be the settled doctrine of the court, and they do not question its correctness or seek to have it reviewed. That under the swamp land grant of 1850 a patent is not necessary, in order to confer title upon the state, that where, in any given case, the particular tracts constitute a por-

tion of the subject-matter of the grant contemplated by the act of 1850, having been authoritatively ascertained, the grant at once takes effect, as to the portion so designated, and the title thereto vests in the State, without a patent, the issuance of which, as was remarked by Judge HOLMES, in the case of *R. R.* v. *Smith*, 41 Mo., 310 (S. C., 9 Wall., 95):

"May be considered as the act of a ministerial officer. Lists of such lands, selected by state authority, when approved by the Secretary of the Interior, and reported to and accepted by the Governor, are clearly sufficient to complete the grant and vest the title. Such lists were made in the present case, and the title to the lands in controversy were therefore vested in the state at the time of the location and settlement made by the plaintiff in 1856. Although no patent had then issued to the State, and said lands were no longer subject to sale by the United States authorities, and it was beyond the power of Congress to divest such title by legislative enactment without the consent of the State. The record shows that a relinquishment of the state's title to these lands was twice requested of the executive of this state by the Secretary of the Interior, but no such relinquishment was ever made.

Plaintiff's counsel, however, contend that if the Acts of 1855 and 1857 were themselves insufficient to divest the title of the State to the lands in question, sections 24 and 25 of the Act of the Assembly of 1868, in relation to swamp lands, constitute a legislative acceptance of the provisions of said Act, and the indemnity thereby provided, and create an estoppel to any claim on the part of the State to the proprietorship of these lands. Section 24 of the Act named, authorized the Governor to relinquish the title of the State to such swamp and overflowed lands as may have been sold by the general government since the passage of the Act, donating the said lands to the State, whenever the counties interested in said lands, may by an order of the County Court, authorize him so to do. Section 25 constitutes the register of lands, the agent of the State to settle and adjust all claims the State of Missouri may have against the United States growing out of the swamp land grant, and also to receive all money

or scrip from the general Government, due to the various counties as indemnity on account of swamp lands sold by the Government of the United States, since the donation of said lands to the State. We confess ourselves wholly unable to perceive how the foregoing provisions can be fairly construed, as constituting a positive relinquishment by the State of its title to the lands in question, or an unconditional acceptance of the indemnity provided by the Acts of Congress. On the contrary, the only relinquishment provided for, is one to be made by the Governor at the request of the County Courts, and the indemnity which the register of lands is authorized to collect from the United States, is such only as would accrue in consequence of relinquishment so made, or such as would accrue in consequence of relinquishment so made, or such as would accrue in cases where no relinquishment was necessary. That is in cases where the title had not vested in the State at the date of the Acts of Congress aforesaid. It is no answer to this view, to say, that it was unnecessary as a matter of law, to have the consent of the counties in order to make a valid relinquishment to the United States. That although the lands had been donated to the counties, they were still subject to the control and disposal of the law-making power. This may be so, but as the law-making power has limited the power of relinquishment to the cases named, such limitations being reasonable and valid must be observed."

In *Gaston* v. *Stott*, 5 Or., 48, the court on p. 60 said:

"The grant, being a legislative grant *proprio vigore*, passed to the grantee immediately all the estate which the grantor had in the subject-matter of the grant, except what is expressly excepted.

The United States had a fee simple title to all the unsold swamp and overflowed land at the time of the passage of the act of 1850, and hence a fee simple passed to the States affected thereby. *No subsequent act of Congress could diminish the estate or clog it with new conditions or except from the operation of the grant any swamp and overflowed lands not originally excepted. Generally, title once parted with is gone forever. A fee simple estate passed to a grantee cannot be affected by subsequent unilat-*

eral acts of the grantor. HENCE THE ACTS OF 1855 AND 1857 CANNOT BE REGARDED AS AFFECTING THE ESTATE OR THE TITLE. And these views are abundantly fortified by the fact that there is an utter absence in all the acts of any express words or reasonable implication by which the title of the state should be divested or the land revert to the General Government in any manner, or by any method known to the law. *The question of the character of the grant is no longer an open one. The second section of the act of 1850 in pointing out the duty of the Secretary of the Interior, is simply matter of direction to a ministerial officer; the patent provided for operates only by way of further assurance*, and the trust raised by the proviso is a matter of legislative, and not of judicial concern.

The act of 1855 in no way affected the title acquired in virtue of the original act; neither did the confirmatory act of 1857; and the congressional recognition by this last act of the proposition, that prior to the issuing of patent the fee simple to the land remains in the General Government, is a solecism unworthy the serious attention of the court."

In 1 Dec. Sec. Int., 508, Sec. Schurz held that lands selected and reported to the general land office as swamp prior to March 3, 1857, if otherwise unappropriated were confirmed to the State by act of that date.

VI.

In Illinois an action of ejectment must be determined by the legal title alone and equitable defenses, if any exist, cannot be interposed.

The trial court refused to hold this sixth point which plaintiff requested in its words. (Rec., 25; See 11 proposition of law.)

This holding was in the face of a current of authorities from the beginning to the end of the Illinois reports.

The Illinois Supreme Court in its opinion ignore this error.

Equitable defenses cannot be made in an ejectment suit where, as in Illinois, the distinctions between equity and common law exist.

This principle does not affect the doctrine that at law or in equity a deed may be shown to be void for want of power to execute it.

In *Chiniquy* v. *The Catholic Bishop of Chicago*, 41 Ill., 148, the sixth head note reads:

"It is not competent, in an action of ejectment, to show who paid the consideration money on the conveyance of the premises to the plaintiff, with the view to establish a a trust. In this action the legal title must prevail against every equity."

A court of law will not regard the equities of a case but such equitable rights must be enforced in a court of equity in an equitable action.

O'Neal v. *Wabash Ave. Bap. Ch.*, 48 Ill., 349.

Carpentier v. *Montgomery*, 13 Wall., 480 496.

An equitable estate cannot be asserted to defeat a legal title.

Chiles v. *Davis*, 58 Ill., 411.

In *Johnson* v. *Watson*, 87 Ill., 535, Breese, J. (p. 540), said:

"Legal titles must prevail in an action of ejectment. If, a legal title so acquired is challenged, it can not be adjudicated in a court of law, but a court of chancery must be invoked.

"The deed is not void but voidable only, and a court of chancery may set it aside; until that is done, it must, at law, prevail."

In *Finlon* v. *Clark*, 118 Ill., 30, Magruder, J., said:

"A court of law, upon the trial of an action of ejectment, will not stop to hear evidence as to whether a conveyance, absolute on its face, was or was not intended by the parties to be a mere mortgage security. The remedy of the grantee in such a deed is in equity. He may there file his bill and enjoin the ejectment suit, and show the true character of the instrument. A court of chancery has full power to protect his rights."

The position of defendant is that the legal title is in the plaintiff under the act of Congress, Sept. 28, 1850, and the act of the legislature of Illinois, June 22, 1852, but that by the act of March 4, 1854, the legal title of Cook county became Eagan's equitable title, which by mesne conveyances has vested in defendant.

We have shown that the facts do not support such a statement.

But assuming for argument that defendant has an equitable title, yet he cannot defend in ejectment and make such equitable title prevail over the legal title.

If defendant had a title good in equity to the land, it constituted no defense to this action of ejectment. Such equity could assert itself only by a bill in chancery. Examples of enforcing such equities by such equitable remedy are found in the following cases.

Silver v. *Ladd*, 7 Wall., 219.
Meader v. *Norton*, 11 Wall., 442.
Johnson v. *Towsley*, 13 Wall., 72.
Aldrich v. *Aldrich*, 34 Ill., 32.
Forbes v. *Hall*, 34 Ill., 159.
McDowell v. *Morgan*, 28 Ill., 528.
Walker v. *Hedrick*, 18 Ill., 570.

The holder of the legal title is a trustee for the owner of the equitable title.

"It is enough" to support such bill in chancery that complainant "shows that he has the equitable title to the premises and that he is entitled to the legal title, which, by some means, no matter what, has been vested in the defendant." Caton C. J. in *McDowell* v. *Morgan*, 28 Ill., 528, 533.

VII.

The Act of March 4, 1854, of the Legislature of the State of Illinois (Ill. Laws, 1854, p. 19), transferred the title of said Cook County in said land to William B. Eagan and his assigns, and thereby impaired the obligation of the contract contained in the first section of the Act of 1852 (Sec. 1, Ill. Law, 1852, p. 178), which conveyed said land to said County of Cook by an absolute present grant.

In this discussion it will be assumed that we have convinced the court that the swamp land grant was one *in præsenti*, whereby the swamp lands in the State of Illinois were conveyed to such State, by the Act of Congress of Sept. 28, 1850, upon the day of the passage of such law.

In our discussion that the swamp land grant was one *in præsenti*, we have also shown to the court that the Legislature of the State of Illinois, by a present grant, conveyed all of the swamp land in Cook County to such county by the first section of an Act passed June 22, 1852. We again quote the exact words, making such conveyance: "*All the swamp and overflowed lands granted to the "State of Illinois, by the Act of Congress entitled 'An "Act to enable the State of Arkansas and other states to "reclaim the swamp lands within their limits', approved*

"Sept. 28, 1850, ARE HEREBY GRANTED TO THE COUNTIES "RESPECTIVELY IN WHICH THE SAME MAY LIE OR BE "SITUATED."

Such language created a present grant in the County of Cook of the lands in question, unless there is some condition in the Act of June 22, 1852, which modifies or changes that absolute grant, making it a conditional one.

The Supreme Court of the State of Illinois, in its opinion, sums up what it has to say about these two Acts of its legislature, and the acts of Congress of March 2, 1855, and Nov. 3, 1857, in these words (Rec., 40): "We "think it a fair and reasonable construction of the acts of "1852 and 1854, when considered in connection with the "acts of Congress, *to hold, that where lands had been "bought in good faith from the United States the title to "such lands did not become vested in the county, but passed "to the purchaser under his entry.*"

It is the act of purchase from the United States which renders the title of the county void, for without such act of purchase its title was in fee simple absolute.

The opinion, although professing to accept the doctrine that the swamp land grant is one *in præsenti*, does not enforce such principle, and denies the right and title of plaintiff under it; but it does endeavor to carry into effect unconstitutionally the act of Congress of March 2, 1855, and it construes the act of March 4, 1854, of the State of Illinois, to be governed by its construction of the act of Congress of March 2, 1855, which the opinion says modified the act of June 22, 1852, and divested the title to the land in question which had become a vested right in the County of Cook, by virtue of the first section of such act of June 22, 1852. The legislature in this action, dis-

regarded the fact that the grant was an absolute present grant, as of Sept. 28, 1850, and did seek to change rights which had vested.

Let us understand the relation of Cook County to the swamp land legislation of the State of Illinois.

The first section of the act of June 22, 1852, by the language which we have already quoted, vested a present absolute title in fee to the lands in question, in the County of Cook.

All the conditions in such act of June 22, 1852, are to be found in Sec. 2 of said act, which reads as follows :

"Whenever it shall appear that any of the lands granted to the state by the aforesaid act of Congress shall have been sold by the United States since the passage of this act, it shall be lawful for the said counties to convey such lands to the purchasers thereof. The said deed of conveyance shall be made by the judges of the county court, as such, and countersigned by the clerk of said court, with the official seal thereof affixed; and on delivering said deed to the purchaser, the county judge shall take from him an assignment of all his rights in the premises, and as such assignees they shall be authorized to receive from the United States the purchase money of said land; and whenever any lands embraced by the said act have been located by bounty land warrants since the passage thereof, it shall be lawful for such county in which the same are situated, to convey the same in manner aforesaid, to the person or persons who located said warrant, and to take assignment of the same to them as county judges, who shall thereupon be considered as assignees of the state, and as such may locate said warrant on any of the public lands belonging to the United States within the limits of such county, or elsewhere. Whenever lands embraced by the said act have been located since the passage thereof, under the provisions of the act of congress, approved 4th September, 1841, it shall be lawful for the counties in which the same may lie, to locate a like quantity of public land within the limits of such counties, or elsewhere: *Provided*, the same shall be located in accordance with the provisions of the said act of 4th Sept., 1841, and whenever any swamp and overflowed lands within the limits of any county, lying outside of the six sections, and within the 15 miles of the Central railroad and branches, have been selected by the Central railroad company, under the provisions of the act of Congress, approved Sept. 20, [28] 1850. and which are of the character embraced by the said act of the 28th Sept., 1850, it shall be lawful for any such county to select other lands in lieu thereof within the 15 miles authorized by the act of 20 [28] Sept., 1850, and it is hereby understood, and so intended by this act, that all the rights of the state accruing thereto in the above enumerated cases, under the said act of 28th Sept., 1850, and the decision of the Secretary of the Interior, of 23 Dec., 1851, in regard to the grants made by the said last mentioned act, * * are hereby vested in the counties aforesaid, for the purposes aforesaid."

The following examination of the statutes of Illinois will demonstrate that the condition or provision of section two just quoted (§ 2 Ill. Laws, 1852, 178), did not apply to Cook County upon the day of its passage.

This court takes judicial notice of the statutes of the United States and State of Illinois "without averment or "proof."

Hanley v. *Donoghue*, 116 U. S., 1, and cases cited on page 6.

The law of March 4, 1854, (§ 3, Ill. Laws, 1854, 19), (see p. 79, brief) did seek to make such section apply to Cook County, and did seek thereby to divest the title of the County of Cook, to this land, and transfer it to Eagan, or his assigns, and, therefore, impaired the obligation of the contract contained in section 1 of the act of June 22, 1852, which conveyed it to the county.

When this conveyance was made by this act of June 22, 1852, the County of Cook was under township organization under an act in force April 1, 1851, (Ill. Laws, 1851, 35,) permitting counties to change their governing bodies from county courts to boards of supervisors, and to create townships.

By article 1, section 1 of that act it was provided:

"That at any general election that may be holden in the several counties in this state, the qualified voters in any county may vote for, or against township organization in any county in this state."

By Art. 1, Sec. 6, it was provided: "The commission-"ers shall proceed to divide such county into towns, by "making as many towns as there are townships, accord-"ing to government surveys." By Art. 3, Sec. 2, a supervisor was to be chosen in each township. By Article 16, the powers and duties of the county board of supervisors are defined, and all county business is provided for in detail.

It would serve no useful purpose to quote at length any other provision of this act. Under it, the County of Cook by a vote at any general election, had authority to change its executive and legislative body from county courts to boards of supervisors.

We find that such election had occurred before June, 1852, from an examination of the case of *People* v. *Long*, 13 Ill., 629.

The statutes of Illinois conclusively show that Cook county was under township organization when the Act of June 22, 1852, became a law. See Illinois Laws, 1852, p. 11, where the Board of Supervisors of Cook County were authorized June 15, 1852, to borrow money to erect and improve public buildings, so that the governing body of Cook County was a Board of Supervisors on June 22, 1852. (See also Ill. Laws, 1851, p. 27.)

Such counties, whose governing body was a Board of Supervisors, had no authority to sell or dispose of swamp lands under and by virtue of the provisions contained in the Act of June 22, 1852, which power to sell related solely to counties in Illinois, whose governing body was "County Courts."

The County of Cook after receiving the title to said land on June 22, 1852, had no special legislative authority to dispose of it until March 4, 1854; (Ill. Laws, 1854, p. 184), when an Act was passed, expressly conferring power upon the Board of Supervisors of Cook County to sell swamp lands. This act was in these words:

"An Act to vest the board of supervisors of Cook County, to control the swamp and overflowed lands situate therein.

"SEC. 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That the care and superintendence of so much of the swamp and overflowed lands granted to the State of Illinois by the Act of Congress, entitled 'an act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits.' Approved September twenty-eighth, one thousand eight hundred and fifty, as lies in the County of Cook, is hereby vested in the Board of Supervisors of said county, and the said board of supervisors are hereby vested with all the powers in relation thereto heretofore given to the County court, subject in all respects to the provisions of the act, entitled 'an act to dispose of the swamp and overflowed lands, and to pay the expenses of selecting and surveying the same,' 'approved June 22, 1852.

"SEC. 2. This Act shall be in force from and after its passage.

"Approved March 4th, 1854.'"

And the same Legislature on the same date, March 4, 1854, (Ill. Laws, 1854. p. 19), gave such power by its third section to the Board of Supervisors in counties

"In all cases where any of the lands granted to the counties by the * * * [foregoing act,] have been sold by the United States since the passage of the Act of Congress entitled: 'An act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits,' approved September 28, 1850, the County courts of the several counties in this state, shall by an order to be entered of record at any regular or special term, sitting for the transaction of county business, make all necessary orders for securing to the purchasers who have purchased swamp and overflowed lands situated in their respective counties, since the passage of the Act of Congress as aforesaid, in pursuance and in the manner prescribed by the act of the general assembly of this state, to which this is an amendment: *Provided*, that the County courts may, in their discretion, require the purchasers aforesaid to pay to the drainage commissioner for the use of said county, the cash at the rate they purchased the lands from the United States, within the time to be specified by said court, by an order entered of record as aforesaid, and on a failure on the part of all such purchasers to comply with the terms of said court, as specified by this act, the said swamp and overflowed lands, purchased by the United States as aforesaid, may be sold by the County courts or drainage commissioners, as other swamp and overflowed lands are sold."

(§ 1, Ill. Laws, 1854, 19.)

And by the following act of 1859 full authority to convey was given.

of the act of June 22, 1852, which the opinion says, by

virtue of the passage of the statute of March 4, 1854, divested the title of Cook county to this land. The first words of such section are:

"Whenever it shall appear that any of the lands, granted to the state by the aforesaid act of Congress, shall have been sold by the United States, since the passage of this act, *it shall be lawful for the said counties to convey such lands to the purchasers thereof.*"

And then after providing that the judges of the county court shall make such deed, it reads:

"And on delivering said deed to the purchaser the county judges shall *take from him an assignment of all his rights in the premises, and as such assigns they shall be authorized to receive from the United States the purchase money of said land.*"

And what applies more particularly to the facts of the record in this case:

"*And whenever any lands embraced by the act have been located by Bounty Land Warrants, since the passage thereof, it shall be lawful for such county, in which the same are situated, to convey the same, in manner aforesaid, to the person or persons who located said warrant,* AND TO TAKE AN ASSIGNMENT OF THE SAME TO THEM AS COUNTY JUDGES, who shall thereupon be considered as assignees of the State AND as such MAY LOCATE SAID WARRANT ON ANY OF THE PUBLIC LANDS BELONGING TO THE UNITED STATES WITHIN THE LIMITS OF SUCH COUNTY OR ELSEWHERE."

There is nothing in the act of June 22, 1852, and March 4, 1854, of Illinois, unless you couple them with the Act of Congress of March 2, 1855, as the opinion does, which can make it the duty of the plaintiff to give its title to Eagan's assigns, because it was lawful for the county to do so, and also transferred such title from the county to Eagan's assigns.

We have shown under our second point that under the first section of the Act of 1852 the title to this land passed as an absolute grant to the plaintiff upon the same principle that it passed to the State as a present grant. And that there was nothing in the Act of 1852, which qualified or restricted the grant to Cook County.

If the Act of March 4, 1854, did apply, which we deny, yet, when this Act of June 22, 1852, was passed, it had no application to the Eagan entry, because Eagan had not at that time entered this land nor did he until sixteen months afterwards. The Act of 1852 could very properly be applied to such sales as occurred between Sept. 28, 1850, and June 22, 1852, but any condition beyond that in this statute would be unconstitutional.

Fletcher v. *Pool*, 20 Ark., 100.

The construction given by the Supreme Court of Illinois to the acts of the Illinois Legislature passed June 22, 1852, and March 4, 1854, is not conclusive on this Court whenever (as in the present case) the contract of the State, though made in the form of laws, is involved.

Jefferson Branch Bank v. *Skelly*, 1 Black, 436.

Similar provisions were made as to preemptors.

If we surround ourselves with the circumstances which existed when this act was passed, we shall find that it only gave as it says, lawful authority for the county judges to convey these swanp lands to any person who may have entered or pre-empted the same since the passage of the swamp land grant, Sept. 28, 1850.

The grant of the lands is made without any condition, and a present absolute title in fee as of the date of such grant, June 22, 1852, vested in the county, and related back to Sept. 28, 1850, conveying whatever title was conveyed to the State by Congress. This power to convey and obtain title to other land merely meant that lawful authority should be given in all cases of this sort for the county courts, the governing legislative

bodies of certain counties to invite and protect settlers, and in case they had entered pre-empted lands at the United States Land Offices, not knowing that they were swamp lands, the county authorities, could upon request of such entrymen or pre-emptors, receive an assignment of their titles from the registers and receivers to such lands, and thereupon the county could take lands, which were not swamp lands, but any of the public domain anywhere within their respective counties, or in the State of Illinois. This arrangement was not intended to destroy the qualities of the grant of September 28, 1850, but a mere business arrangement which prevented any conflict between the United States authorities and the state authorities, in adjusting the question of what were swamp lands. Its attempt to divest the title of the counties to such lands, was unconstitutional.

The court will bear in mind that the foregoing discussion applies generally to this provision of section two in the statute of June 22, 1852, which applied only to counties whose governing body were County Courts, and as we have already shown, it had no application whatever to the County of Cook, because that county was under township organization, its governing body being a board of supervisors.

The property had the character of private property, and occupied exactly the same condition, although a gift from the State, as though the county under lawful authority had acquired the title to the property by purchase.

The Supreme Court of Illinois has held that such property was not public property, but private property, and that the seven year statute of limitations with payment of taxes would cut off the title of the county.

County of Piatt v. *Goodell*, 97 Ill., 84.

If the holder of a bounty land warrant had assigned his receipt to the county in August, 1855, the county could have used it in August, 1855, to have located the same quantity of land, which was not swamp and overflowed. The title to the land so located by Cook County would have become the private property of Cook County free from legislative interference.

For Eagan or his assign to avail themselves of what the defendant claims his rights are under the act of March 4, 1854, acting under section two of this act of June 22, 1852, it was necessary for Eagan or his assigns to have assigned his register and receiver's certificate, issued to him Oct. 20, 1853, to the board of supervisors of Cook County. There is no pretense in this record that any such thing was ever done or attempted. Certainly this never occurred before Aug. 10, 1855, and upon that day such register and receiver's certificate was cancelled. After the cancellation of such certificate it was beyond the power of Eagan or his assigns to have made such an assignment, therefore beyond their power to have made compliance with this essential provision of the law. We insist that if they had made such an assignment, and the board of supervisors of Cook County had refused to issue to them a deed, the title of Cook County would not be transferred by such act of Eagan and his assigns in asking for a deed from Cook county upon such assignment of their register and receiver's certificate.

In speaking of a similar matter the court in *Bradford* v. *Hall*, 36 Fed. Rep., 801–807, said: "But no payment "of any money was ever made by the company to the "state so that no title ever vested in the company under "this act."

In *Jasper Co.* v. *Wadlow*, 82 Mo., 173, 175, it is held

that when the county sells swamp land, such sales are the same as when sold by an individual, the mere sale does not transfer title, but payment, etc.

It is absurd to say that because the board of supervisors were granted power to convey this land in 1854, that without any request, it became their duty to make such conveyance.

As we have shown, the title to this land as an absolute present grant in fee, vested in the County of Cook, June 22, 1852, and it remained in that condition as must be conceded until March 4, 1854, when the special Act authorizing Cook County to sell lands and the general Act authorizing Boards of Supervisors, to sell lands which included Cook County, operated to divest the title to this land in the County of Cook, and to transfer it to Eagan's assigns. This is done by force of the legislative power of that Act of March 4, 1854, which needs no argument to demonstrate, that if such is the result of such legislation, then it impairs the obligation of a contract, and is obnoxious to the United States Constitution, and therefore void. Under these circumstances, such portions of the Act of March 4, 1854, as has accomplished this transfer of title from the county to Eagan's assigns, was void, and cannot be used in this case, to prevent the plaintiff from recovering in this suit of ejectment.

We insist that it is too plain for a more extended discussion that the title having become vested, as must be admitted, under the Act of June 22, 1852, in the County of Cook, as an absolute present grant of that day, the legislature of the State of Illinois, had no power by the Act of March 4, 1854, to declare that the title did not vest under the Act of June 22, 1852, and to compel the county to transfer its title to Eagan's assigns.

And the fact that Eagan or his assigns had never put themselves in such a way as to entitle them to a conveyance from the County of Cook, demonstrates conclusively that the fee of these lands which passed to Cook County by the Act of June 22, 1852, still remains in Cook County.

This suit is submitted on briefs, and the claim of defendant's title will now be investigated.

VIII.

Eagan's Entry.

This entry was made October 20, 1853, at the United States Register and Receiver's office at Chicago, Illinois.

The certificate of the Surveyor General, for the States of Illinois and Missouri, whose office was at St. Louis, Missouri, certified these lands to be swamp lands, Oct-29, 1853.

The Egan entry cannot claim an earlier date for its title than Oct. 20, 1853, though the defendant's counsel will urge (Rec., 12) from a memorandum upon said warrant, in these words: "This entry is in conform-"ity with Com. letter Sept. 13, 1853. *The cash* "*part was paid Feb. 28, 1853.* James Long, Register." That the inception of the Eagan entry was Feb. 28, 1853. There is no evidence of the payment of any money except this memorandum which does not show whether or not, the amount was sufficient.

The Bounty Land Warrant, No. 2,495 (Rec., 11)' was not received by the register and receiver until Oct. 20, 1853. Such warrant is not produced to show

how many acres it represented. There is, however, a memorandum endorsed upon the warrant (Rec., 11), that it contained forty acres. The defendant, therefore, claims from the endorsements upon the register and receiver's certificate, that he paid $1.25 an acre, cash, Feb. 28, 1853, and a forty-acre Bounty Land Warrant, Oct. 20, 1853.

Such memorandums are of the same character as the memorandum written across its face: "*Canceled. See "letter to R. R. at Springfield, Aug. 10, 1855. Binck-"ly.*" And another memorandum: "Cancellation noted "on tract book 17, Nov'r. 1855."

In the introduction of this certificate, with all of its memorandums, no explanation accompanied it, or was attempted on the part of the defendant, although the holder of it, Aug. 10, 1855, Henry S. Monroe, was called by defendant as a witness. (Rec., 22.)

The plaintiff objected to the introduction of this register and receiver's certificate, on the ground that the swamp land title was earlier, Sept. 28, 1850, and the title under this certificate, Oct. 20, 1853; also, that *the register and receiver had power to cancel the certificate, with the consent of the holder of such certificate so requesting such cancellation;* also in law, the commissioner of the general land office had power to cancel such certificate, and that as such certificate was offered in evidence by defendant, so canceled, such cancellation would bind the party offering it, unless it gave evidence to show such cancellation to be illegal and void.

The court allowed the register and receiver's certificate to be used in evidence without requiring the defendant to explain the circumstances under which the certificate was canceled.

From this ruling of the court, such canceled certificate being treated by the court as though not canceled, and also as being a better title than the swamp land grant, became the controlling point of the case.

We reproduce as near as can be in type the cancelled certificate.

"Military Bounty Land Act of March 22, 1852.

"Land Warrant No. 2495. Register and Receiver's "No. 34.

"Land Office, October 20, 1853.

"We hereby certify that the attached Military Bounty "Land Warrant No. 2495, was, on this day, received at "this office from William B. Eagan, of Cook County, "State of Ill.

"James Long, Register.

"Eli B. Williams, Receiver."

I, William B. Eagan, of Cook County, State of Illinois, hereby apply to locate and do locate, the SouthWest fractional ¼, N. I. B. L.

~~S. W. ¼ of S. W. fr. (N. I. B. L.)~~

quarter of Section No. ~~19~~, (7) seven, in Township No. 37 N. (37 N.) of Range No. 15 E., in the District of Lands, subject to sale at the Land Office at Chicago, containing 41.48 acres in satisfaction of the attached warrant, number 2495, issued under the Act of 22d March, 1852.

Witness my hand this 20th day of October, A. D. 1853.

William B. Egan.

Attest:

James Long, Register.

Eli B. Williams, Receiver.

I request the patent to be sent to.....

Canceled see letter to J. R. & R. Springfield, Aug 10, 1855 Linky

Reinstated see W. L. L. 15, p. 043. Aug 40a substituted.

LAND OFFICE, Chicago, October 20, 1853.

We hereby certify that the above location is correct, being in accordance with law and instructions.

JAMES LONG, Register.
ELI B. WILLIAMS, Receiver.

(Endorsements:)
40 acres, 2,495. 40.

CHICAGO, Ill.

Wt. 101,043. Act. 18. 40 acres.
Substituted for the above number.
Feb'y 15, 1883.
Canceled see letter to Reg'r, Springfield, Ills., Aug't 10, 1855. BINCKLY.

Cancellation noted on track book.
17 Nov'r, 1855.
R. W. B.
B. K.
Re-instatement noted Feb'y 15, 1883.
See cash entry No. 29,521, Springfield.
LAWRENCE.

This location is re-instated and warrant No. 101,043, for 40 acres, Act of Sept. 28, 1850, substituted for Wt. No. 2,495, for 40 acres, Act of 1852, in Div. K., February 15, 1883.

E. KILPATRICK,
Div. "K."

See letter in Div. K. to Cohrs, Dearborn & Shope, Chicago, Ill., Feb. 15, 1883.

M. L. 25,029.

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

APRIL 25, 1883.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed copies are true and literal exemplifications from the files of this office.

United States General Land Office Seal.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed at the City of Washington on the day and year above written.

N. C. MCFARLAND,
Commissioner of the General Land Office.

(MEMORANDUM.)

This entry is in conformity with Com. letter September 13, 1853. The cash part was paid February 28, 1853.

JAMES LONG, Register.

Wt susp., however, for erasure, party desires its location canceled, see Reg. (Chicago) letter of May 28, 1855, canceled therefor and party allowed to relocate with another Wt. No. 101,043.

August 10, 1855.

In *Shinn* v. *Hicks*, 68 Tex., 277, the deposition of the commissioner of the general land office was taken to show the meaning of entries on a land warrant. The court said, page 280. "There was no error in this, for had the "entry not been such as to explain itself it would have "been proper for the commissioner to have stated what "was intended to be understood by the persons engaged "in that office from the entry, he having knowledge how "the records were kept."

The official correspondence of the commissioner of the general land office and of the register and receiver of the United States land office are admitted in evidence to prove the official acts of those officers.

Carman v. *Johnson*, 29 Mo., 84.

And the action of officers of the land department are presumed to be valid. This is especially true where more than twenty-five years have elapsed before such action was questioned.

The court will keep in mind that in the discussion of this question, we are making our argument as though the two titles depended upon which title was prior in its commencement. This position is erroneous, as we demonstrate under our second point, if the Swamp Land Grant was one *in præsenti*, because then the inception of plaintiff's title was Sept. 28, 1850, and Eagan's entry, without reference to its cancellation, or the confirmatory Act of Congress of March 3, 1857, would have no better standing as a defense than the Bunn entry. We do not waive the doctrine of *in præsenti*, which we claim governs and controls this case, but it is more convenient to discuss the Eagan entry in the manner we have suggested.

We have elsewhere shown that under instructions from the United States Land Department, Illinois, by its Act of June 22, 1852, in its fifth section, provided that its county surveyors should "make out plats of all the "swamp and overflowed lands in the several townships "within their counties, noting distinctly upon the same "every tract or parcel of swamp and overflowed land in "each township." * * * "and it shall be his duty "to return the same as soon as practicable, and in reason-"able time, to the clerk's office of the county court" *

* * "and the said plat with the description shall be "recorded in said book, and filed away among the rec- "ords of the office."

Now, if we look at the certificate from the commissioner of the General Land Office (Rec., 8), we find that John Loughborough, Surveyor General, acted upon the plat on file in the county clerk's office of said Cook county, which was made by John Van Horn, county surveyor for Cook County, and after being so recorded in said county clerk's office, the same was transmitted to said surveyor general at St. Louis, Missouri, where it was approved Oct. 29, 1853.

There is a distinction, which the court should keep in mind, between the duties of the general government and those of a municipal public corporation, like the County of Cook. In *U. S.* v. *Schurz*, 102 U. S., 378, 403, it was determined that when a purchaser from the government had done all in his power and made full payment, or complied with all the acts requisite, so that he was entitled to a patent, which patent had been executed, but not delivered, that the title to the land passed without the delivery of such patent.

But in the case of individuals, and in the case of counties like plaintiff, no legal title to lands sold by them, passed until the actual delivery of the deed.

Another distinction in this connection is important to prevent confusion. The government being the source of all titles to land in the United States, except in the thirteen colonies, every person who becomes the owner of lands, took such land with knowledge of this historical fact, and takes it with knowledge of all the circumstances concerning such title. Because every detail of the title

to any piece of ground, so far as the general government is concerned, or its officers, are matters of public record which bind every person dealing with such property. Not so, however, after the title has actually passed from the government, because then the recording laws of the State of Illinois govern, but we do not invoke such recording laws, except upon the one question that the county surveyor of Cook County did plat and locate this land, as the record demonstrates, before Eagan entered it.

It is an historical fact that all the records of the County of Cook were destroyed by the great fire of Oct. 9, 1871, and among other records the identical plat of John Van Horn, county surveyor, designating this land to be swamp lands, and the evidence showing the exact date when such plat was recorded.

These records were public records of Cook County, and bound all persons dealing in the lands located in said county. We do not claim that on October 20, 1853, the United States records had a specific description of the land in question, as swamp lands; but we do claim that the public records of Cook County, and an examination of the land in the field disclosed such facts, and were notice to and bound Eagan when he entered it.

This position is sustained by the conduct of Eagan and his assigns, who really have never claimed anything under such entry until the Bunn entry came into existence, when they concluded it would be a prudent matter to obtain the Eagan title.

The plaintiff does not claim that the register and receiver, or the land commissioner, or the Secretary of the Interior could arbitarily, or as a judicial act, cancel a valid entry of land. We do claim this, however. The

cash being paid at one time, the bounty land warrant at another, and erasures existing in the warrant, and perhaps for causes which none of the facts upon the face of the papers show, the holder of such certificate could, if a mistake had been made, which was mutual between him and the land officers, have requested such cancellation, and as a business transaction, it would be perfectly valid and legitimate. If Eagan entered this land supposing that it was not swamp land, and then requested its cancellation to locate lands not swamp land, we find sufficient cause to sustain the action of the government officers in making such cancellation.

And we find a memorandum on the warrant, introduced in evidence by the defendant (Rec., 12.): "Wt. Susp. for erasure, party desires its loca-"tion canceled. See Reg., (Chicago) letter of May "28, 1855, canceled therefor, and party allowed to re-"locate with another Wt., No. 101,043, Aug. 10, 1885." This memoranda which is made evidence by the defendant, clearly indicates that the party desired its location canceled, and his request was granted, and he was permitted to take further action if he saw fit, but no further action appears to have been taken so far as this entry was concerned, and consequently such entry stood canceled. This cancellation having existed for more than twenty-five years as shown by defendant, without question, it may be regarded as an ancient document, which establishes itself as it reads, canceled. 1 Greenleaf on Evidence, 141 N.

The only evidence to offset such cancellation was the reinstatement of such certificate since the commencement of this suit.

In *Town of La Pointe* v. *Town of Ashland*, 67 Wis., 251, 259, court said:

"It is a rule in the action of ejectment, of such uni-
"versal recognition, that the plaintiff can recover only
"on such title as he held at the commencement of the
"action, that we forbear to state any reason or cite any
"authority in its support."

And again when an attempt was made to resuscitate, the Eagan entry Feb. 15, 1883, such re-instatement was inoperative, at that date, because the title had gone from the United States, both by the swamp grant and by the patent to James H. Bowen.

It is a self-evident proposition that the government, through its officers, would not and could not have re-instated the Egan entry, except upon the request of the holder of the title claimed under the Bunn entry, upon a surrender of the patent issued upon such entry.

The letter to the former attorneys of the defendant, dated Feb. 15, 1883, since the commencement of this suit, was not introduced in connection with this certificate, though no reason is perceived why it was not competent if this reinstatement was.

On Feb. 14, 1883, Com. McFarland (1 Dec. Sec. Int., 509) having found the lands were swamp, he directed the register and receiver at New Orleans to cancel the entries of pre-emptors and homesteaders. He said (page 514):

"Advise parties who have made the entries that they will be canceled and the purchase money refunded; and in the case of homestead entries the parties will be allowed to make new entries with credit for the fees and commissions paid, or on application the money so paid will be returned to them."

The commencement of the swamp land title being earlier that the Eagan entry was the better title.

IX.

Bunn's Entry.

In the court below, no contest existed with reference to the entry by Bunn. We suppose that will be the case in this court, and therefore shall make a very brief statement of the principles which we think govern such title.

John W. Bunn entered the land in controversy by a certificate from the United States Register and Receiver at Springfield, Illinois, May 24, 1870. (Record, 18.) This certificate was assigned by Bunn to James H. Bowen, Oct. 3, 1870. (Record, 18.)

Upon such certificate and assignment, the United States issued a patent to James H. Bowen, Nov. 16, 1870. (Record, 19.) Bowen conveyed to defendant, Jan. 1, 1872. (Record, 19, 20.)

After the passage by the Legislature of the State of Illinois of the Acts of June 22d, 1852, and Mar. 4, 1854, to which reference has already been made, the Legislature on Feb. 14, 1859, (Ill. Laws, 1859, P. 20, and Gross Ill. Stats., 736), provided: "The county courts of the several "counties of this State are hereby authorized and em- "powered to sell and dispose of at public or private sale, "for cash or credit or for such securities as the County "court may think proper to accept, all or any of the "swamp or overflowed lands lying within the counties, in- "cluding also, all and every interest, claim, demand and "gift granted to them by the State of Illinois, arising "under the Act of Congress passed Sept. 28, 1850, and "Acts amendatory thereof."

By Section 4, of the same Act, it was provided: "This

"Act shall apply to all counties of this State having "special laws in reference to the sale of swamp lands, "under which they may act, without reference to such "special acts, and in counties where township organiza- "tion has been adopted, the Board of Supervisors are "authorized to carry out the provisions of this act."

Such act of Feb. 14, 1859, (Ill. Laws, 1859, P. 201), gave full power to the County of Cook to dispose of its swamp lands without any pretense of any restrictions of any kind or character.

In speaking of this act in *Smith* v. *Goodell*, 66 Ill., 450, Breese, J., said it "placed the whole subject of the dis- "position of these lands under the exclusive control of the "several counties in which they were situate."

Ry. Co. v. *McDougal*, 113 Ill., 603, 608.

It is too clear to require extended argument that the title of the County of Cook, being older in its inception, (Sept. 28, 1850), was a better title than the title under the Bunn entry, (May 24, 1870), and this principle is so well settled that we shall cite no authories in its support.

The judgment of the State court sustained the title under the Bunn entry, so there "is drawn in ques- "tion the validity of * * * "an authority exercised "under the United States," to wit: the selection of this land as swamp land by the United States Surveyor General therefore; "and the decision is against (its) "validity," and gives this court jurisdiction to do justice between the parties litigant.

Tyler v. *Magwire*, 17 Wall., 253.

X.

Those portions of the odd numbered sections lying within six miles on either side of the line of the Illinois Central Railroad that were swamp and overflowed lands on September 28, 1850, passed by the Swamp Land Grant, of that date, to the State of Illinois.

Our position is, that the grant for the Illinois Central Railroad of the even numbered sections Sept. 20, 1850, and the increasing of the price of the odd numbered sections, so as to make them double minimum lands did not operate to take such odd sections as were in fact swamp and overflowed lands out of the swamp land grant of Sept. 28, 1850.

In determining this question, it is pertinent to inquire what lands the United States owned when the Swamp Land Act was passed. It is a fact so well known, that we may claim it to be historical, and the records of the United States Land Office will show it, that at that time the great bulk of the lands throughout the whole length of Illinois, over which the Illinois Central Railroad was subsequently located, and built, were vacant and unappropriated.

Congress passed, September 20, 1850:

"An act granting the right of way, and making a grant of land to the States of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile." (9 Stats., 466.)

By the second section of this act, there was granted to the State of Illinois, for the purpose of aiding in the construction of a railroad, in addition to the right of way, 100 feet in width, every alternate section of land, designated

by *even* numbers for six sections in width on each side of said road and branches" with the proviso, that if, when the line of the road should be located, it should be found the Government had parted with its title to any of these *even* sections, then it should be lawful to select other lands most contiguous to the tier of sections above specified in alternate sections, but within fifteen miles from the line of the road, to supply the deficiency, and so as to make the whole grant "equal in quantity to one-half of six sections in width on each side of said road and branches."

By the same section there was also expressly reserved from the said grant "any and all lands reserved to the United States by the act entitled "An Act to grant a quantity of land to the State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois river with those of Lake Michigan, approved March 2, 1827." (4 Stats., 224.) *But the act contains no other reservation whatsoever.*

By the third section of said act, it was provided, "*That the sections and parts of sections of land, which by said grant shall remain to the United States within six miles on each side of such roads and branches, shall not be sold for less than double the minimum price of the public lands when sold.*"

The railroad contemplated by the grant, was a line extending from Dubuque, in Iowa, running through the State of Illinois to Cairo, with a branch extending from Centralia to Chicago.

At the time of the passage of this act, the great bulk of the lands within fifteen miles on either side of the proposed line of railroad, were a part of the public domain, as is abundantly shown by the published reports of the General Land Office.

The grant for the benefit of the railroad was only for the *even* numbered sections, and the railroad acquired no interest whatever in the *odd* numbered sections within the six mile limits. A few of the lands within the six miles limit had been acquired by private purchase from the

government, but the title of these neither passed to the railroad company, nor to the state under the swamp land grant; they, therefore, cut no figure in this inquiry.

This condition of things left the great bulk of the odd numbered sections within six miles of either side of the railroad, when it came to be located the property of the United States, AND UNAFFECTED BY THE PROVISIONS OF THE RAILROAD GRANT, EXCEPT AS TO MINIMUM PRICE.

These odd numbered sections constitute no part of the grant of 1827, in aid of the Illinois and Michigan Canal, and in the railroad grant there being no other exception, they were not, by any law, reserved or taken out of the public lands.

The third section of the act of Sept. 20, 1850, contains all there is to be found in that or any other statute of the United States, which in any way affects their status as public lands. It will be perceived that Congress, by the act under consideration, left them in the precise condition that they were in previous to the 20th day of Sept., 1850, save only that their price was increased from $1.25 to $2.50 per acre. Their custody still remained with the land department. The incidents both of control and of sale, remained the same.

This being the legal condition of the title to the odd numbered sections, Congress, on the 28th of September, 1850, passed "An Act to enable the State of Arkansas "and other states to reclaim the swamp lands within their "limits." (9 Stats., 519.)

By the first section of this act, "the whole of those "swamp and overflowed lands made unfit thereby for "cultivation which shall remain unsold at the passage of

"this act *shall be and the same are hereby granted to said* "*State.*"

And by the fourth section, the provisions of the act were extended to every State in the Union, in which such swamp lands might be situated; which included the State of Illinois.

Such swamp land grant being a present grant, as is now conclusively established, the United States then owning these odd numbered sections, and there being no reservation of them in this or in any previous act of Congress, we claim that it necessarily follows: That such portions of these odd numbered sections as were at the time swamp and overflowed, and then remaining unsold by the government, passed to the state by force of this grant upon the day of its passage, Sept. 28, 1850.

It has never been claimed, but that upon the face of these acts, such a result followed, but it will be claimed in oppostion to us that none of these odd numbered sections passed to the State, because they were at the time reserved. Before proceeding to show how utterly untenable such a claim is, we will cite at length the action of the Interior Department on which is based the claim of reservation of these lands.

It arises upon a letter to the President, and his endorsement thereon, and upon instructions of the commissioner of the General Land Office to the local registers and receivers. (Rec., 13.) From the endorsement of the President upon the letter of the commissioner, dated Sept. 19, 1850, it will be perceived, that the President did not approve of any reservation of these lands, but simply consented that the sale of them should be suspended until the road should be located and the lands

selected, provided such time should not exceed six months. *It cannot be said that action taken under this letter, produced a reservation of these lands, as against a grant by Congress. To so hold, would place the executive above the legislative power in a matter fully committed to the control of Congress by Article 4, Section 3, clause 2, of the Constitution.*

The president has been granted power to make reservation of public lands by proclamation from time to time by acts of Congress which are collated in a note, in 1 Copp's Public Lands Laws (Ed. 1890), 1 (§ 4, Act June 26, 1834, 4 Stats., 687).

If there were any lawful reservation, it must be found in some act of Congress, since the clause of the Constitution above referred to vests in that body the power of disposition and the absolute right to prescribe the times, the conditions and the mode of transferring the public domain, or any part of it, and to designate the persons to whom a transfer shall be made, and this power is subject to no limitations. *Gibson* v. *Chouteau*, 13 Wall., 99.

If the temporary suspension of the sale of these lands could be construed to be a reservation, still a temporary reservation of lands will not operate to exclude them from a subsequent grant. *Ham* v. *State of Missouri*, 18 How., 132.

There ought not to be any confusion of ideas respecting lands merely withdrawn for some purpose of sale, and lands severed from the body of the public lands by a declared reservation for a public purpose. Reserved lands, properly so called, pass from the custody of the land department by the fact of reservation, as in the case of tracts set apart for Indian, military and light-house purposes.

In *Wilcox* v. *Jackson*, 13 Pet., 512, the point was expressly made that an appropriation or reservation of any part of the public domain so as to withdraw it from being subject to pre-emption, must be made by an act of Congress, and the court conceded the position, but decided that the site of Fort Dearborn (which was the property in dispute) had been appropriated by law as a military reservation.

Whether there was any authority to issue these orders to the local registers and receivers, suspending the sale of these lands or not, it is very evident from the language of the whole of them, that they were only intended as a direction to withhold these lands temporarily from private sale, and had no reference even remotely to any action that congress might thereafter see fit to take. In fact, the whole procedure shows that there was no reservation by law, but a mere arbitrary exercise of power by the executive department of the government.

As an original question, it would seem, there could be little doubt but that the title of the state on Sept. 28, 1850, was valid, but on Nov. 20, 1855, (Record 14 and 1st Lester's Land Laws, 521,) Secretary McClelland, as to other lands, made an adverse ruling, holding that inasmuch as the commissioner of the general land office had, on the 19th of September, 1850, directed the registers and receivers in Illinois, with the approval of the president, to " withhold from sale, or entry of any kind, until further notice" the public lands within the district of the railroad grant, that for this reason no lands within six miles passed by the swamp land grant of Sept. 28, 1850.

After that decision was made which upon its face bears very little evidence of any accurate understanding of the

question at issue, the Interior Department, in its administration of the swamp land grant, has adhered to it without any re-examination of the question upon its merits, but upon the principle solely of *res adjudicata* and *stare decisis*, as department rulings.

In the case of *Fremont and Mills Counties* v. *R. R.*, 22 Iowa, 128, (affirmed 9 Wall., 89,) it appeared that Secretary Edmunds had caused lands to be certified to the railroad company, that in fact belonged to those counties as swamp lands. And it was claimed that his action in the premises, whether right or wrong, being political and executive in its character, could not be reviewed or drawn in question by the courts of the country. But the Court in rejecting that theory held:

"That if a legal or vested right is in any way impaired or violated by an executive officer of the government, even in the matter of certifying lists of land granted previously by Congress we suppose such violation, to fall as legitimately within the judicial cognizance of the courts, as if the same right had been invaded by an individual, or by the legislative department of the government. We take it to be a well established principle of law, that when a party in the prosecution of a right, does everything which the law requires and fails to attain his right by the misconduct, negligence, ignorance or mistake of a public officer, the law covers and will protect the right."

Citing in support of these principles:

Lytle v. *State of Ark.*, 9 How., 315.
Lessieur v. *Price*, 12 How., 60.
Ladiga v. *Roland*, 2 How., 581.
Bagnell v. *Broderick*, 13 Pet., 436.
Wilcox v. *Jackson*, 13 Pet., 490.

This court has decided that these odd numbered sections within six miles of the railroad, were subject to pre-emp-

tion, notwithstanding the railroad grant, which could not have been the case, were they reserved in any lawful manner. *Clements* v. *Warner*, 24 How., 397. The Supreme Court of Illinois held the same way in *Baty* v. *Sale*, 43 Ill., 351.

Secy. Vilas, in 8 Dec. Sec. Int., 308, held, that "lands "covered by a temporary reservation for the benefit of "the government at the date of the swamp land grant, "are not excepted therefrom, but pass thereunder as of "the date of the grant on being relieved from such res- "ervation." The question considered was, whether the secretary of the interior should request the attorney general, as recommended by the land commissioner to institute proceedings to cancel patents issued to the State of Michigan for swamp lands, which were of the old Fort Mackinaw wood reservation on Bois Blanc Island. By executive order of Nov. 8, 1827, these lands were reserved from sale for the purpose of supplying fuel for the garrison at Fort Mackinaw. The lands had previously been surveyed showing a portion of the subdivisions to be swamp, and overflowed lands. This was the condition of these lands at the date of the passage of the swamp land act. The reservation continued in force until the act of congress of July 5, 1884, provided for the disposal of military reservations. On Sept. 30, 1884, the Governor of Michigan, transmitted a list of lands within said reservation, shown by the survey to be swamp and overflowed and requested that they be conveyed to the state as swamp lands and they were so patented March 10, 1885. The secretary said, p. 309:

"The fee to the lands in question, as well as the use and occupation, was in the United States at the date of the grant of Sept. 28, 1850. They were reserved from

sale, and set apart for the purpose of supplying fuel to the garrison at Fort Mackinaw, and for no other purpose, and this special temporary use might be terminated by the government at any time. In fact, the consumption of the supply of fuel on the reservation would of itself have terminated the object of the reservation, although it would not have released it. These lands were therefore in a condition to be granted, and the question presented is, was this reservation of such a character that the lands had been practically disposed of, or was it the intention of Congress that lands embraced in a reservation of this character, should pass by the grant.

Congress may grant any and all lands, the fee to which is in the United States, unless such lands have been sold or in such manner disposed of, that another disposition of those lands would be incompatible with the obligation of the government to others. The grant in this case was: 'A present grant, vesting in the State *proprio vigore* from the day of its date title to all the land of the particular description, therein designated, wanting nothing but the definition of the boundaries to make it perfect.'

(*Wright* v. *Roseberry*, 121 U. S., 488, and authorities therein cited.)

"Although the lands may, at the date of the grant, be temporarily reserved, or set apart for the use of the government, or for other temporary purposes, not amounting to a disposal of the land, it will not prevent such lands from being subject to the operation of the grant, and when disencumbered the right attaches as of the date of the grant, therefore the sole question to be determined is, was the reservation of such a character as to amount to a disposal of the land.

"With reference to swamp lands temporarily reserved for the use of the government or other purposes at the date of the grant, not amounting to a disposal of the land, this grant should receive the same construction given to the grant for school purposes."

The learned secretary refers to and explains the following cases, as supporting his views: *Ham* v. *Mo.*, 18 How., 126. *Cooper* v. *Roberts*, 18 How., 173. *Beecher* v. *Wetherby*, 95 U. S., 517. *Buttz* v. *R. R.*, 119 U. S., 55, and concludes page 313:

"It is therefore not inconsistent with the theory of a grant *in presenti*, that the full free and present enjoyment of rights under the grant should be subject to a contingency.

The principle announced in the cases cited as controlling the grant for school purposes, is alike applicable to the grant of Sept. 28, 1850, granting to the State all of the swamp and overflowed land, which shall remain unsold at the date of the grant, which included all the land of the character specified, owned by the United States at the date of the act, although they may, at that time, be reserved from sale or set apart for some temporary use of the government.

So, therefore, the swamp land grant is a grant *in præsenti*, vesting in the state the fee simple to all lands of that description, at the date of the passage of the act subject to the use of the government or other uses for which a reservation is made, so long as that reservation shall continue."

The swamp land grant was an immediate present grant vesting the title to such lands in the State of Illinois.

The grant to the railroad now known as the Illinois Central Railroad was also a present grant of even sections but though a present grant it remained in the nature of a float until its route was located which did not occur until 1851 or 1852. (Rec., 21.)

Until such location the title of the railroad was afloat and could in no event modify the conveyance of the odd swamp land sections to the State.

In *R.R.* v. *Smith*, 41 Missouri, 310, Holmes, J., said p. 335:

"No doubt, if the Secretary of the Interior had included these lands in his list and plats of swamp and overflowed lands, his action would have been final and conclusive of that matter in the courts; but his including them in this

list of railroad lands is not conclusive. It was left open by Congress to be determined on judicial investigation. The power to determine it finally was not given to any public officer. The political power over the subject was not retained by the government, but it was made a question of evidence and judicial construction, and we think it was intended to be, and was referred to the courts."

In *San Francisco Sav. Union* v. *Irwin*, 28 Fed. Rep., 708, which case was affirmed by this court in *Irwin* v. *San Francisco Sav. Union*, 136 U. S., 578.

Field, J., said, p. 715:

"We do not give any weight to the fact that in 1853, by order of the President of the United States, Mare Island was reserved with all its appendages of tule or marsh lands, reputed to belong to such island. If any such reservation was intended to include all the swamp and overflowed lands in controversy, it was to that extent inoperative. The title, as I have already shown, having been passed to the State by the act of September 28, 1850."

What passed to the State of Illinois by the act of Sept. 28, 1850, is a question of law, which it is the province of this Court to decide, and it is no more bound by the opinion of Secretary McClelland than it would be by the opinion of any intelligent gentleman who had expressed his views upon it.

There lands having been granted to the State of Illinois, when at most, a temporary reservation was made, the title vested in the State of the date of the grant subject only to such reservation.

We think we have shown beyond any reasonable question that if the lands were temporarily reserved, yet the act of Congress of September 28, 1850, granted the lands and thereby made them free from any such temporary reservation. Under our fifth point (brief 65), we have

shown that the lands in question, being selected and listed as swamp land, the act of Congress of March 3, 1857 (11 Stats., 251), the land came within the provisions of that act, and the title to them was confirmed in the State, though they were within six miles of the line of the Illinois Central Railroad.

The trial court, by the fifth proposition of law, (Rec., 23) held that the title to these lands vested in the State of Illinois under the swamp land grant, although the same was within the six mile limits of the Illinois Central railroad. The Supreme Court of Illinois concede this position to be correct. We have sought to show upon principle without reference to conflicting claims that the railroad grant did not in any manner reserve said lands, and could not prevent Congress from granting the odd sections under the act of September 28, 1850.

The importance of the subject-matter and the legal questions involved in the record, are the only excuse for so long a brief. The question of the jurisdiction of this court is upon several grounds beyond question. The swamp land grant was a grant *in præsenti* to the State of Illinois, of the land in question Sept. 28, 1850. The evidence which shows this fact is the certificate of the commissioner of the general land office, and the certificate of the state auditor of Illinois, both of which were offered in evidence. The United States statutes authorize the one to be evidence, and the statutes of Illinois authorize the other to be evidence.

The title being in the State of Illinois, it did by a grant similar in every respect to the swamp land grant, so far as its legal qualities are concerned, convey by its first section the lands to the County of Cook. The opinion

of the Supreme Court of Illinois overlooked the fact which cannot be controverted, that the conditions contained in the second section of the act of its legislature of June 22, 1852 (Ill. Laws 1852, 178), did not apply to the County of Cook, when said title became vested in said county by force of the first section of said act.

The act of the legislature of the State of Illinois of March 4,1854 (Ill. Laws, 1854, 19),committed a grievous error by impairing the obligation of the grant of such land to the County of Cook, and in attempting to transfer such title from said County of Cook to the entryman. The opinion of the Supreme Court was in accordance with such unconstitutional law.

Said opinion also declared that the canceled certificate, although done by consent of its holder, was void, and denied the right and title of the County of Cook to the land under the swamp land legislation.

Disregarding the opinion of the Supreme Court of the State of Illinois, it is apparent that the judgment of the state court has deprived the plaintiff of its rights in this land, under the act of Congress of Sept. 28, 1850.

We ask that the judgment be reversed and said cause remanded.

Respectfully submitted.

EDGAR TERHUNE,
County Attorney of Cook County.

CONSIDER H. WILLETT,
CHARLES B. WOOD,
Of Counsel for Plaintiff in Error.

Supreme Court, U. S.
FILED.
DEC 22 1890
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 1406.

THE COUNTY OF COOK,
Plaintiff in Error,
vs.
THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

REPLY BRIEF OF PLAINTIFF IN ERROR.

EDGAR TERHUNE,
COUNTY ATTORNEY OF COOK COUNTY.

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REPLY BRIEF OF PLAINTIFF IN ERROR.

There are but two facts in dispute between the plaintiff and defendant.

The first may be explained as follows: The plaintiff claims that the act of the State of Illinois, of June 22, 1852, (Sec. 1, Ill. Laws 1852, p. 178), made a present absolute grant of this land to the County of Cook, which is conceded by defendant.

The plaintiff claims that section two of said act had no reference whatever to the County of Cook, because the conditions in such section applied to counties not divided into townships, whose governing bodies were county

courts. And the County of Cook at that date was divided into towns, and had at that time no such governing body, its governing body being a board of supervisors.

Because the opinion of the State court made a misstatement of fact in saying that section two did apply to Cook county (coupling it with the act of 1854 as amendatory of it), and made the grant by the first section of said act of June 22, 1852, a conditional one, the defendant's counsel insist that, as a matter of fact, there was a condition in the grant to Cook county. Argument cannot make this matter plainer. A reference to the statute will show that the statement of the plaintiff, that the title vested in Cook county, free from any conditions of section two, is a fact which cannot, and should not, be disputed, as counsel for defendant attempt to do, based upon such erroneous statement in the opinion of the Supreme court of Illinois.

To sum up this question of fact, then, the plaintiff claims that the title in fee to the land in question, vested in Cook county, by virtue of the legislative grant contained in section 1 of such act, and the defendant erroneously urges (when the contrary is clear on the face of the act) that section two, which only applied to counties having county courts, applied to Cook county, which was not in that class of counties because it had a board of supervisors.

The second question of fact in dispute is whether or not the register and receiver's certificate, dated Oct. 20, 1853, offered by defendant was, as written on the face of it, and as indicated by various memorandums on it, canceled Aug. 10, 1855.

The plaintiff contends that it was canceled, and that lawful authority existed for such action.

The defendant attempts to deny the memorandums upon the certificate showing it was canceled Aug. 10, 1855, and tries to construe the word "canceled" to be a mistake on the part of the Commissioner of the General Land Office, and insists that if not a mistake, that such Commissioner had no authority to take such action. This last matter, of course, being a pure question of law, as to whether or not authority existed in the Commissioner of the General Land Office, Aug. 10, 1855, for any cause whatever to cancel such certificate.

We need not refer to the other facts of the record, except as we have occasion to mention them in commenting upon the statement of defendant's counsel, contained in their brief.

As to the questions of law involved, the defendant's counsel insist that the State courts admitted to its fullest extent the doctrine that legislative grants are grants *in præsenti*. It is curious when they make this admission, that they insist at the same time, that the Acts of Congress of 1855 and of 1857, which they claim gave them the title after the United States had conveyed it, and similar provisions contained in the acts of the Legislature do not interfere with, and contradict the doctrine of *in præsenti*. Therefore we must take such admission exactly as we must take it in the opinion of the Supreme court

of the State of Illinois, that after having made the admission, they failed to act upon it, and the judgments fail to enforce the principles of such doctrine, because this doctrine, properly applied to the facts of this case, eliminates every other question from the record.

Defendant's counsel continually make the effort to say that the state courts held, as matter of law, that the title did not pass under the act of 1852 to Cook County while such statutes make it clear the title did so pass and was divested, if at all, by the act of 1854. This should not be a question of law, but one of fact, involving a construction of the grant to the county.

If a single federal question is found in the record, it confers jurisdiction upon this court.

And jurisdiction so given, the court will pass upon the case upon its merits, although in so doing, it will of necessity, decide questions that in themselves would not confer jurisdiction.

Such a question is the claimed equitable title of defendant under the Eagan entry.

The Bowen patent, being a legal title, properly finds its place in the record for what it is worth.

There are a number of important matters which the defendant either expressly or by its silence has admitted to be as claimed by the plaintiff. The most important of these questions is what is called the six-mile limits. We contend that in declining to answer our position upon this question, that the defendant's counsel admit our statement of facts and law concerning it to be correct.

The defendant has here abandoned any claim of title to this land under the Bowen patent.

The defendant's counsel admit that if there was jurisdiction in the land department to cancel the Eagan entry, that the act of Congress of March 3, 1857, confirmed the title to this land in Cook County.

In the trial court the payment of taxes was urged as an estoppel against the plaintiff, but the State courts being adverse to this contention the defendant abandons it here.

The defendant does not question the right of the plaintiff to hold the land as an individual holds property.

The greater portion of defendant's brief is devoted to an attempt to persuade this court that it has no jurisdiction of the facts embraced in this record. The writ of error in this case, having been properly issued, and citation served, and the stipulation signed and filed, that this cause should be submitted on its merits under rule 20, it is now too late for the defendant to question the jurisdiction of this court, at least unless a motion to dismiss is expressly made for that purpose.

Primæ facie, the questions involved give this court jurisdiction. We shall show that this court has jurisdiction.

The other questions of law and fact we can best discuss under the headings, cancellation and contract.

Jurisdiction.

The rules of this court provide that an application on the part of the defendant in error to dismiss the writ must be made by motion (see rule 6). Such was the course taken in the cases relied on by defendant, to wit:

Crowell v. *Randell*, 10 Peters, 368.
Bolling v. *Lersner*, 91 U. S., 594.
Brown v. *Colorado*, 106 U. S., 95.
Railroad v. *Guthard*, 114 U. S., 133.

Defendant's application to dismiss the writ of error in this case has not been made in proper form or in apt time, and must be disregarded.

THE PLAINTIFF UNDER THE ACT OF CONGRESS OF SEPTEMBER 28, 1850, CLAIMS THE "TITLE" AND "RIGHT" TO THE LAND IN QUESTION, AND THE DECISION IS AGAINST SUCH "TITLE" AND "RIGHT."

The contention of the plaintiff is that by the first section of Act of Congress of September 28, 1850, the title to the land vested in fee simple in the State of Illinois. And by the use of identical language the Legislature of the State of Illinois by its act of June 22, 1852, in its first section, conveyed such land to the County of Cook. The "decision" of the court, its judgment of affirmance, denied that such legislative grants vested the title in fee in plaintiff.

The act of Congress of March 3, 1855, like this "decision," denied that the swamp land grant conveyed an absolute title of the day of its passage. This act of 1855 was based upon the idea that Congress had not in fact conveyed the swamp lands, but had power to make other disposition of them until a patent had issued under the second section of the act of 1850.

The opinion construes these acts of Congress together with the Illinois acts of 1852 and 1854, and denies that the "title" and "right" to this land became vested in the

plaintiff under the legislative grants. And in effect holds that the act of 1855 is a limitation upon and controls the act of September 28, 1850, which is clearly erroneous if the swamp land grant was one *in præsenti*, and vested rights had been acquired under it September 28, 1850.

We contend that the entry made by Eagan never had any validity whatever. At the very utmost it was nothing more than an attempt on his part to purchase of the Government land which was no longer owned by it.

It is in vain that defendant's counsel reiterate that the "opinion" finds that the second section of the act of 1852, made the conveyance to Cook County by its first section conditional that if the United States sold the land the county should, willing or unwilling, convey to such purchaser.

Why convey to such purchaser if a title in fee was not in Cook county? If no title vested in Cook county why such anxiety to demonstrate that it was the duty of the county to convey, and the law, seeing such duty, would presume a conveyance to the entryman.

This version of the "opinion" by defendant's counsel is not warranted.

The "opinion" sought to enforce the act of 1855, and in so doing denied plaintiff's "right" and "title" under the act of 1850.

If any such absurd contract can be found in the grant of 1852, as defendant's counsel claim to find in its second section, we have clearly shown (Pt. brief, pp. 74, 79) that it had no application to Cook County.

The only counties embraced in such second section were those organized with "county courts" and the section

did not apply to counties under township organization with "Boards of Supervisors."

The "decision" and the "opinion" denied the "title" and "right" of plaintiff to the land claimed by it under the act of 1850, as it stood when enacted.

And a denial of our title and rights under this original swamp land grant gives this court jurisdiction.

The plaintiff claims to have obtained its title from the State by the Illinois act of June 22, 1852, and it was not necessary to set up this statute in the pleadings, or to make a formal offer of it in evidence. The trial court took judicial notice of every existing Illinois and United States statute, without offering them in evidence.

Hanley v. *Donohue*, 116 U. S., 1, 6.

The Supreme court of Illinois has, by its judgment, declared the Illinois act of June 22, 1852, not to be a contract with (or grant to) Cook County; and it is upon this act alone that the plaintiff relied to sustain its title. The judgment is therefore properly brought to this court for review.

In speaking of this act of June 22, 1852, counsel assert (Argument, 27,) that the Supreme court "held that the "conditions of the grant were such that no title passed to "the county" and we understand from this that counsel for the defendant admit that the Supreme court of Illinois decided that the act of June 22, 1852, was not a contract with (or grant to) Cook County.

This admission clearly confers jurisdiction within the rule laid down in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443.

The "decision" and the "opinion" deny the "title" and the "right" of plaintiff to the land under the act of Congress of March 3, 1857 (11 Stats., 251) and thereby gives jurisdiction to this court.

Let us put out of mind all facts except those which alone relate to such jurisdiction. Let us keep in mind the first section of act of Congress of September 28, 1850, (9 Stats., 519); the first section, act of Illinois, of June 22, 1852, (Ill. Laws, 1852, 178); the attempted sale to Eagan, Oct. 20, 1853; the cancellation of such entry Aug. 10, 1855.

Then if we read the act of March 3, 1857, and apply it to the foregoing facts, the "title" and "right" to this land was confirmed and vested in the plaintiff by force of such confirmatory act of Congress.

The entry being canceled and the lands being in the list of swamp lands within the meaning of the confirmatory act of March 3, 1857, such act confirmed and conveyed the title to this land to Cook County.

Cancellation.

The language of § 709, R. S., is: "A final judgment "* * * in any suit in the highest court of a state in "which a decision in the suit could be had where is drawn "in question the validity * * * of * * * an "authority exercised under the United States, and the "decision is against their validity * * * or where "any title right * * * is claimed under the * * * "statute of * * * or authority exercised under the "United States, and the decision is against the title right "* * * specially set up or claimed by either party "under such * * * statute * * * or authority,

" may be re-examined and reversed or affirmed in the " Supreme court upon a writ of error."

We claim such language gives this court jurisdiction. What are the jurisdictional facts? The land, under act of 1850, was granted to Illinois. The act of 1852 granted the land to Cook County. The act of 1854 placed a condition upon such grant. The condition was that the county should convey to any subsequent entryman. (Such entry never being made, or being made and withdrawn, the title was free from such condition.)

Because of such condition (which we elsewhere show impaired the obligation of the grant to the county) the entry of Eagan October 20, 1850, was valid.

Such entry was canceled August 10, 1855.

(Whether such entry was canceled by the request of Eagan or his assigns or done under the supervisory power of the land department over entries we need not stop here to discuss, *the fact of cancellation existed.*)

It remained canceled when the confirmatory act of March 3, 1857 (11 Stats., 251), became a law. It remained canceled when the act of 1859 (Ill. Laws, 1859, 202), withdrawing such condition to the Illinois grant, became a law.

The " opinion " and " decision " deny the " title " and " right " of plaintiff to this land because they deny the power and jurisdiction of the officers of the United States land department to cancel the Eagan entry as was done by them in this case.

Moore v. *Robbins*, 96 U. S., 530.

Defendants' counsel lay great stress upon the point that the record does not raise the questions we are now urging, and to fully demonstrate the utter weakness of

this position it is only necessary to call attention to the fact that our title and the propositions for which we contend rest upon *statutes* of whose existence the court takes judicial notice. A reference to the opinion of the Supreme court shows that the statutes which we are discussing were considered and construed by that court. (Rec, 37–40.)

The chancery case of *Detroit City Ry. Co.* v. *Guthard*, 114 U. S., 133, has no parallel with the one under consideration; as stated in the opinion, "The apparent ques-"tion presented for decision was whether the state had "changed the mode of taxation by what was done. * "* * No judge, in deciding the case would be "likely to suppose that, if he gave judgment for the re-"ceiver of taxes, he would deny the company any 'right, "'title, privilege or immunity,' 'specially set up or "'claimed' under the constitution of the United States" and "the record does not show that any such claim was "made in the state courts." And the court dismissed the writ.

In this suit Cook County has always claimed under the statutes drawn in question, and such statutes constitute a part of its chain of title.

The case of the *Susquehanna Boom Co.* v. *West Branch Boom Co.*, 110 U. S., 57, cited by counsel, cannot control this case, as it was a *suit in chancery* where it was essential for the pleadings to show affirmatively the charter which was claimed to be a contract which had been impaired, and there was no mention of the charter in the case, until after judgment in the Supreme court, and then only on a petition for rehearing.

In the case at bar, however, the acts of Congress of

September 28, 1850, and March 3, 1857, and the acts of the Illinois legislature of June 22, 1852, and March 4, 1854, were brought in question in the trial court, as shown by a reference to the propositions of law (Rec., 24, 25 and 27) and the opinion of the Supreme court as well. (Rec., 37–40.)

Jurisdiction exists because the obligation of a contract is impaired.

What are the facts?

A grant or conveyance by the United States to the state of the land as swamp lands by act of 1850. A grant or conveyance by the State to the County of Cook by the first section of act of 1852 free from conditions. (If any conditions were contained in the second section, they did not apply to Cook County.)

The legislature of Illinois by act of March 4, 1854, (Ill. Laws, 1854, 19), transferred the title and right in said land to Eagan; and thereby impaired the obligation of the grant, the contract, contained in the conveyance of this land to Cook County by the act of June 22, 1852.

We desire to urge upon the attention of the court that we are not asking its consideration of facts upon a record presenting conflicting testimony, but do ask for a construction of an act of Congress, a grant by the State, and the action of the General Land Office in respect to a part of the public domain.

And our contention is that by the judiciary act of 1789,

these and kindred questions were intrusted for final examination to this tribunal.

This court having taken jurisdiction, will look into the whole case and decide it on its merits, though some of the questions necessary to a decision upon the merits are not federal questions.

Cancellation.

A register and receiver's certificate may be canceled by the land department upon notice and for proper cause after the issuing of a final certificate until a patent is issued and recorded.

Hestres v. *Brennan*, 50 Cal., 211.
Vance v. *Kohlbury*, 50 Cal., 346.
Jeffords v. *Hine*, 11 Pac. Rep. (Ariz.), 351.
Hays v. *Parker*, 3 Pac. Rep. (Wash.), 901.
Root v. *Shields*, 1 Woolw., 341, 364.

And the cases under this heading from which we quote.

We claim that *prima facie*, the Eagan Register and Receiver's Certificate, when offered in evidence, was canceled.

This evidence was offered by the defendant, as a better title, than, what, without such evidence, was admitted to be a *prima facie* title in plaintiff.

No explanation was attempted on the part of defendant, to show that such cancellation was void. Every one familiar with the records and methods of the land department, knows that no action is taken without preserving a record of the reasons why action is taken, and every person interested is duly notified personally by mail. It is

true that no fixed code of procedure has been adopted by the land department, but no complaint has ever been made that reasonable notice of all action taken was not given to the persons interested.

Furthermore if the party interested in this certificate, after it was canceled, had not acquiesced in such action of cancellation, he had ample opportunity to take an appeal to the Secretary of the Interior and rectify the mistake, if such cancellation was in fact or in law a mistake.

On the face of this certificate, as offered in evidence, it was void, because canceled.

It was like a judgment importing jurisdiction and good faith in the officers of the land department.

The plaintiff in its original brief relied upon the memorandums showing such cancellation to be done at the request of the holder of such certificate.

The defendant concedes that the certificate could be canceled upon the request of the holder, but urges that it was a mistake, as shown by its correction, when the entry was reinstated during the pendency of this suit.

The plaintiff originally urged and insists now that the reinstatement of the entry could not wipe out its cancellation, for three reasons:

1. The reinstatement occurred since the commencement of this suit.

2. The land department having certified this land as swamp land by issuing a list which the United States and the Illinois courts have recognized as equivalent to a patent, the legal title of the United States passed from it when such list of swamp lands was issued, and divested the land department of power or jurisdiction after that.

3. The issuing of a patent by the land department deprived it of jurisdiction over this land.

The fact which ousted the land department of jurisdiction was the issuing and delivering, November 15, 1870 (Rec., 19), of a patent to James H. Bowen, assignee of John W. Bunn.

To regain such jurisdiction, a surrender and cancellation of the Bowen patent upon the request of the holder of such patent title would be necessary. The Bowen patent is in full force and effect as of the day when delivered, and it conveyed any legal title to the land which was in the United States.

When the legal title so passed from the United States the jurisdiction of the land department over this land passed beyond its control, and the attempted reinstatement with such outstanding patent was void.

This claim is based upon the principle, which has been firmly adhered to by the land deparment of the United States that after a patent has once been issued for a particular piece of land, all power and jurisdiction of the land department ceases, and such jurisdiction ceases whether the patent issued was, in fact, rightfully issued or not.

The patent having issued, the legal title of the United States passed by such patent, and carries with it all jurisdiction and power of the land department, on precisely similar principles, that a court having entered a judgment or decree in a certain suit, and the term having expired, although it acted erroneously, yet it loses all jurisdiction.

The law very wisely preserves the rights of parties. If the land department has acted erroneously in such

case, it is not to the land department that the party can look for correction of such errors, but to the courts, which alone are given jurisdiction in cases of this sort.

In the adverse case of *Brill* v. *Stiles*, 35 Ill., 305, a patent had issued, so that the courts had jurisdiction upon a bill filed by a superior equity, to compel a conveyance of the patent title to the holder of the superior equity, and the case was rightfully decided upon the facts, and it is *obiter dictum* that the commissioner of the General Land Office could not cancel a final certificate, was unnecessary to the decision. This case was not followed in the case of *Robbins* v. *Bunn*, 54 Ill., 48, where LAWRENCE, J., said: "The finding of the land officers upon the facts "has been held conclusive on the courts, upon the famil- "iar ground that such officers in these proceedings were "acting in a quasi-judicial capacity, and within the scope "of their authority"; and though this case was reversed in *Moore* v. *Robbins*, 96 U. S., 530, it was upon other grounds.

In the recent case of *Clare* v. *Stuyvesant*, 132 Ill., 607, the court on page 623, approve of the action of Justice Lamar, when Secretary of the Interior, in cancelling a homestead entry (Chrisinger's Ca., 4 Dec. Sec. Int., 347). And based upon such power and jurisdiction of the United States land officers to cancel entries for just cause (132 Ill., 624), it refused a specific performance for a ranch in Kansas, for Chicago lots, based upon evidence tending to show that the entries were fraudulent, and subject to be canceled, thereby rendering the title to a part of the lands of the ranch doubtful.

This opinion is based upon the practice of the land department, and the principles that should govern such actions are inconsistent with the conclusion (Rec., 40) of

the opinion in the record, where it says: "The Com-
"missioner of the General Land Office had no authority
"to vacate the entry, and any order that he may have
"made did not affect the right of Eagan. (*Brill* v.
"*Stiles*, 35 Ill., 305)."

Vantongeren v. *Heffernan*, 5 Dak., 180, is a long and well-considered case, in which all the authorities denying and permitting the cancellation of entries of land are discussed, the court sustains the action of the Land Department to cancel such entries at any time before a patent is actually issued and recorded. The form of action was a suit in equity to quiet title, and the plaintiffs and defendants, having conflicting rights as to the land, which were before the Land Department, the court denied the jurisdiction. TRIP, C. J., on page 180, states the real merits of the controversy in the following language: "To maintain this action, the court will be required "to hold that the ultimate title of the government passed "by the final receipt, subject only to the formal or minis-"terial act of the department officers, in issuing the pat-"ent, and that when the local land officers have once "issued a final receipt in case of pre-emption, the com-"missioner of the general land office and the secretary of "the interior have no power to recall or cancel the same, "but that the patent must issue thereon as of course." The court says (page 195): "Must the commissioner "and secretary pause, when in the exercise of their su-"pervisory powers, if they find the local officers have "been imposed upon by fraud, and go to the courts "where litigation may be prolonged for years, before the "case can be closed upon the books of the department, "and when a decision were once reached, of what bind-"ing force or effect would it be upon the department?

"It is very clear within the decisions, that the courts "of equity would not cancel the certificate. The most "they could do, would be to declare that the certificate "belonged to another, and as the courts cannot control "the department in its issue of the patent, it could still "issue the patent to the original certificate holder, making "still another suit necessary to convey the title.

"The better rule then, is as laid down by the courts, "that they will not interfere with the acts of the land "officers so long as the department has jurisdiction to "act, until its jurisdiction has ceased, and its determina-"tion becomes final by issuance of the patent." And the court after explaining at length all causes, denying and permitting the cancellation of entries, concludes, that the commissioner of the land department has power to cancel a final certificate, before the issuance of the patent.

In *Bellows* v. *Todd*, 34 Io., 18, the trial court in an action to recover possession of land refused evidence in rebuttal to show a cancellation of defendant's homestead entry. The court said (page 31): "This ruling was "evidently erroneous; that the evidence offered was ma-"terial requires no argument to show; that it is compe-"tent for the officers of the land department of the "government to cancel sales and entries of lands which "they may find improperly made has frequently been de-"cided by the Supreme court of the United States."

In *Darcey* v. *McCarthy*, 35 Kan., 722, in ejectment, a letter from N. C. McFarland, Comr., dated October 4, 1883, canceling an entry, was sustained to defeat the action.

The court said: "It is also claimed that the action of "the register and receiver in allowing the cash entry of

"the plaintiff is conclusive on the land department, and "that the commissioners had no authority to do that which "his letter attempted to do. Although proof of the right "to enter land must be made to the satisfaction of the "register and receiver, they are not the final arbiters of "such right. They make returns of entries of land to the "general land office which is under the charge of the com-"missioner. That officer has supervisory control over the "subordinate officers in the land department, and can re-"vise and correct their decisions. The entry relied on by "the plaintiff was allowed by mistake and without authority "of law, and it was clearly competent for the commissioner "to cancel and set it aside.

"A land department has been created by Congress, and "rules prescribed for the disposal of public lands and to "the officers of that department, the duty of selling and "disposing of the lands is committed. They can only sell "or dispose of these lands in the manner prescribed by "Congress. In disposing of them there are doubtless many "mistakes made, but the matter is within the control of "the land department until the patent issues and the mis-"takes may be corrected by the officers of that depart-"ment.

"The entry of the plaintiff having been made without "authority was rightfully canceled and set aside by the "commissioner and the effect of the duplicate receipt, as "evidence of title was destroyed. It being within the "scope of the duties of the commissioner to make the "correction, and to cancel the erroneous entry, it will be "presumed in the absence of evidence to the contrary "that it was done, in accordance with the rules govern-"ing such action, and upon sufficient evidence."

In *Randall* v. *Edert*, 7 Minn., 450, two patents hav-

ing issued to adverse parties, and the entry of one having been canceled, the question was as to the validity of such cancellation in a bill filed upon the patent, issued on the uncanceled certificate, and the action was sustained.

The court held: "Every one who purchases land from the "United States, by pre-emption or private entry, does so "subject to the rules and regulations that govern the land "department. All entries are made subject to the supervis- "ion and control of the general land office, and all decisions "are decided by the local land officers, subject to appeal. "All parties who purchase from a pre-emptor prior to the "consummation of the entry, take subject to the power of "the upper office, to confirm or cancel the entry that ex- "isted in relation to the original purchaser."

In *Judd* v. *Randall*, 36 Minn., 12, an action for damages for breach of a covenant of seizin in a deed, was sustained on the ground that the title failed because the entry was canceled. The court says:

"The conclusion of the learned judge, now under re- "view denying a right of recovery is based upon his de- "cision that the action of the officers of the land depart- "ment, assuming to annul and cancel Andrew's entry, "and the proceedings resulting in that end were unau- "thorized and void. The correctness of this decision is "the principal question presented before us."

"It has long been the practice of the land department "in administering the various laws for the disposition of "the public lands even after final proof and the issuing of "the proper final certificate or receipt, and after the ap- "pointed proceedings with reference to making such proof "have terminated, but before the issuing of a patent, to "entertain proceedings anew upon evidence produced be- "fore the Commissioner of the General Land Office, going

"to show that the entry had been fraudulently made and "completed, to order an investigation and upon proof of "fraud, such entries have been canceled. Zabr. Land "Laws, 505; 1 Copp. Land Owner, 123, 124; 2 Copp. "Land Owner, 54; Copp. Land Laws, 220; 6 Copp. Land "Owner, 189; Copp. Land Laws, 421; 11 Copp. Land "Owner, 181; 12 Copp. Land Owner, 70, 158, 170, 226, "250, 265, 289; 13 Copp. Land Owner, 13.

"This practice seems to have been sanctioned by the "Supreme court of the United States in *Harkness* v. *Un-* "*derhill*, 1 Black, 316, 325, and by this court in *Gray* v. "*Stockton*, 8 Minn., 529. The record in the latter case "shows that the hearing which resulted in the cancel- "lation of Howell's entry was ordered by the Commis- "sioner of the General Land Office some three years after "Howell had perfected his pre-emption entry and received "his final certificate. It shows, also, that his proof before "the land officers, in April, 1855, by which his claim was "originally established, included his affidavit that he had "declared his intention to become a citizen of the United "States.

"We feel that we are compelled, by these adjudications "in support of the established practice, to affirm the exist- "ence of the power in question, until the subject shall be "further considered by the Supreme court of the United "States, whose decisions concerning it are of paramount "authority."

In *Quimby* v. *Conlan*, 104 U. S., 420, Justice FIELD (page 425) said:

"A Land Department has been created to supervise all "the various steps required for the acquisition of the title "of the government. Its officers are required to receive, "consider and pass upon the proofs furnished, and in case

"of conflicting claims to the same tract, to hear the con-
"testing parties. The proofs offered in compliance with
"the law are to be presented, in the first instance to the
"officers of the district where the land is situated, and
"from their decision an appeal lies to the Commissioner
"of the General Land Office, and from him to the
"Secretary of the Interior. For mere errors of judg-
"ment as to the weight of evidence on these subjects by
"any of the subordinate officers, the only remedy is by
"an appeal to his superior of the department.

"The courts cannot exercise any direct appellate juris-
"diction over the rulings of those officers or of their supe-
"rior in the department in such matters, nor can they re-
"verse or correct them in a collateral proceeding between
"private parties.

"It would lead to endless litigation, and be fruitful of
"evil, if a supervisory power were vested in the courts
"over the action of the numerous officers of the land de-
"partment on mere questions of fact presented for their
"determination. It is only when those officers have mis-
"construed the law applicable to the case, as established
"before the department, and thus have denied to parties
"rights which, upon a correct construction, would have
"been conceded to them, or where misrepresentations
"and fraud have been practiced, necessarily affecting their
"judgment, that the courts can, in a proper proceeding,
"interfere and refuse to give effect to their action. On
"this subject we have repeatedly and with emphasis ex-
"pressed our opinion, and the matter should be deemed
"settled." Citing: *Johnson* v. *Towsley*, 13 Wall., 72; *Shepley* v. *Cowan*, 91 U. S., 330-340; *Moore* v. *Robbins*, 96 *id.*, 530.

In *Lee* v. *Johnson*, 116 U. S., 48, the cancellation of a

homestead entry was sustained. Justice FIELD, in speaking of the action of the Secretary of the Interior in making such cancellation, said (page 52): "So far from "having exceeded his jurisdiction in directing a can- "cellation of the entry, he was exercising only that just "supervision which the law vests in him over all proceed- "ings instituted to acquire portions of the public lands."

In Cogswell's Ca., 3 Dec. Sec. Int., 23, Sec. Teller (page 28) said, "Congress has assumed that your office (the Commissioner of the General Land Office), has the power to cancel entries after payment and final receipt by providing in many instances, for the repayment of the purchase money upon the surrender of the duplicate receipt.

The petition sets forth, that the laws of Minnesota where the lands in question are situated, declare that the final receipts shall be received in the courts as *prima facie* evidence of title. But the courts of Minnesota have repeatedly decided that 'parties purchasing from pre-emptors before the issuance of the patent, take subject to the authority of the Commissioner of the General Land Office, to cancel the pre-emption entry, and defeat the rights acquired by it.' (See *Randall* v. *Edert*, 7 Minn., 450. *Gray* v. *Stockton*, 8 Minn., 529.) Both of these cases show that after payment and final receipt, the lands had been transferred several times, and at the time the entries were canceled, were obviously held by *bona fide* purchasers, for a valuable consideration. The practice of your office and the law as settled by the courts, is not inconsistent with the character of the title, which arises upon payment, and final certificate, conceding as we do that the 'right to a patent once vested' is 'equivalent to a patent issued,' and that a certificate can no 'more be canceled by the United States, than a patent.'

Generally, then, a patent may be canceled, for the same causes that would authorize the cancellation of a certificate. For instance, a patent may be canceled, if there be any equitable reason as against the government, why a patentee should not retain the patent. If it has been issued without authority of the law, or by a mistake of facts, or by fraud of the grantee, the United States can, by a bill in chancery, have a decree in chancery annulling the patent. Nor is fraud the only ground upon which a bill may be sustained. Patents are sometimes issued unadvisedly, or by mistake, where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent.

In such cases, courts of law will pronounce them void. (See *U. S.* v. *Stone*, 2 Wall., 535. *U. S.* v. *Schurz*, 102 U. S., 404.)

If the patent has issued, the jurisdiction to make cancellation is in the courts, and if your office has improperly issued a patent, it cannot issue a second while the first remains outstanding. (*Moore* v. *Robbins*, 96 U. S., 530.)

But as we have seen, your office has jurisdiction for proper cause to cancel entry after payment and final certificate before patent. The principle upon which the cancellation proceeds in the case of either final certificate or patent, is essentially the same. The tribunals are different."

Admitting that the point is one upon which the authorities are somewhat conflicting, yet the weight of authority in the different states is in accordance with the constant and uniform practice of the Land Department, to exercise a supervisory control over all matters concerning the sale of the public domain, and in all cases of mistake in fact to cancel such action. If we are looking at this question from a narrow point of view, it is because the defendant so elected. The defendant offering this evidence, and having it in his power to give us a full history of this cancellation, we think under well established rules of evidence, is bound by such cancellation, and that the plaintiff has a right to assume the existence of notice, and every fact which may be necessary to give power and jurisdiction to make this cancellation, if it was possible for facts giving such jurisdiction to be in existence.

The defendant has no cause of complaint if such a construction is put upon its evidence, for it has narrowed it down to the mere judgment, the actual cancellation of the land officers, who took action.

The presumption that all public officers do their duty will sustain this action equally with that of a court having jurisdiction of a subject-matter in which it may pronounce judgment.

The power and jurisdiction of the United States over the public domain, cannot be disputed. Every one purchasing from the United States Land Officers purchases subject to such rules and regulations and acts of Congress as have a bearing upon this subject, and we claim that the supervisory power of the Commissioner of the General Land Office, and of the Secretary of the Interior existed when this Eagan entry was made, and

that he and his assigns were subject to such conditions, and they having resulted in a cancellation of the warrant in 1855, that the trial court and the Supreme court in holding such cancellation void, because beyond the power and jurisdiction of the Commissioner of the General Land Office, was error, which must reverse this case.

We disclaim in this discussion that the Land department, after it has issued a patent, has any authority over the acts of its subordinate officers, but we insist that until a patent is actually issued, although the certificate may be final and such that if everything else was right concerning the land a patent would issue, yet until the patent actually issues the department has control of such action of its subordinate officers, and may cancel such entries.

We further insist that it was incumbent upon the defendant to have made explanation, showing that such action of the Land Department was illegal, if, in fact, it could be shown to be, and that having introduced it they are bound by the conditions of such cancellation.

The title offered by the Eagan entry, was only an equity, and a conditional equity at that. The action of the Register and Receiver at Chicago, October 29, 1853, were not binding and conclusive upon the government until their action had been reported to, and approved by their superior officers in the land department at Washington. Until such action was approved and the entry confirmed by those officers, the equity is imperfect and incomplete. Until the officers at Washington acted upon it, it was wholly uncertain whether it would be approved, and whoever purchased in the meantime, did so at the

risk of losing their land if their decision was adverse to the entry. By section 441, U. S. R. S., the Secretary of the Interior is charged with the supervision of public business, relating to public land, and by section 453 (2 Stats., 716, and 5 Stats., 107), it is provided among other things that the "Commissioner of the General Land Office shall perform under the directions of the Secretary of the Interior, all executive duties, appertaining to the sale and survey of the public lands of the United States, or in anywise respecting such public lands." What is the effect of these provisions? The language is clear and explicit. It gives to the Secretary of the Interior general supervisory authority over the acts of subordinate officers, in all matters affecting the disposal of the public domain. This authority is to be exercised by the Secretary in person, and by the Commissioner of the General Land Office acting under his directions.

Supervision implies inspection, examination, control. It necessarily involves the power to correct errors or mistakes committed by those over whose acts it is exercised. Who is to judge of the action of the register and receiver? Such officers themselves, or the officer who prescribes the rules which govern their office, and has supervision over their acts. Let us keep constantly in mind the action that was in fact taken. The register and receiver in this case did accept an entry, which had many erasures in it, and many things which seemed to require an explanation, and did accept it for land which the defendant admits was swamp lands. When the action under this entry was reported to the commissioner, evidently it was canceled Aug. 10, 1855. The counsel for defendant says that that was illegal, because it was *ex parte*. The word "canceled" is merely the judgment of the commissioner that the entry was improper, and he would

not allow it, and it did not prevent the entryman or his assigns from taking an appeal, and if the action was in fact void, from having it made right by the Secretary of the Interior. No appeal was taken, and such action (at least by silence) was confirmed by the entryman and his assigns.

We insist that the presumption prevails that every officer performs his duty, and if we show that under any circumstances the commissioner had jurisdiction to cancel this certificate upon a hearing, or at the request of its holder, which we insist is a fair statement of the case, as presented in our original brief, that in those events such action is conclusive. This is the defendant's evidence, and we have a right to urge that every act was done, which sustains such evidence, as it appears upon its face. We think then we may safely claim that the entry man and his assigns had full knowledge of this action, canceling such certificate; and acquiesced in it, until after the commencement of this suit.

We have demonstrated what effect the Act of Congress of March 2, 1857, should have upon this canceled entry, and we do not care to enlarge upon it here, only to call the attention of the court to it. We insist, as in our original brief, that this entry being canceled, and this land being embraced in the list of swamp lands on file in the department at Washington, it came literally and strictly within the terms and provisions of the Confirmatory Act of 1857, which, by virtue of such Act of Congress, confirmed and made the title perfect in the County of Cook.

The only question involved in the defendant's second point, is not whether Eagan was a purchaser from the United States within the meaning of the conditions con-

tained in section two of the act of 1852, but whether or not power and jurisdiction existed in the Commissioner of the Land Department to cancel the Eagan entry August 10th, as such register and receiver's certificate, appeared when offered in evidence by defendant.

We insist that we have shown that power or jurisdiction existed in the land department to cancel this entry August 10, 1855, and that such action having occurred, it takes the Eagan entry out of this record and leaves the merits to be decided upon the other facts appearing in the record.

CONTRACT.

The grant contained in section one of the Act of June 22, 1852 (Ill. Laws, 1852, 178), is a contract.

University v. *People*, 99 U. S., 309, 321.
Poindexter v. *Greenhow*, 114 U. S., 270, 286.

The words of such contract were:

"All the swamp and overflowed lands granted to the State of Illinois by the act of Congress entitled, 'an act to enable the state of Arkansas, and other states, to reclaim the swamp land within their limits,' approved September 28, 1850, *are hereby granted to the counties respectively in which the same may lie or be situated.*"

This grant has every element of a contract, and is entitled to federal protection.

In *McGee* v. *Mathis*, 4 Wall., 143, Chief Justice CHASE, in speaking of the swamp land grant of 1850 (p. 155), said: "It is not doubted that the grant by the United "States to the state upon conditions, and the acceptance "of the grant by the state, constituted a contract. All the "elements of a contract met in the transaction,—compe- "tent parties, proper subject-matter, sufficient considera- "tion and consent of minds."

"A grant is a contract executed, the obligation of "which still continues, and since the constitution uses the "general term contract, without distinguishing between "those which are executory and those which are exe- "cuted, it must be construed to comprehend the latter as "well as the former."

Fletcher v. *Peck*, 6 Cranch., 88, 137.

This case also holds that when a law is in its nature a contract, and absolute rights have vested under that contract, a repeal of the law cannot divest those rights, and that even a state cannot pronounce its own grant invalid.

In *Grogan* v. *San Francisco*, 18 Cal., 590, it is said, (p. 613), FIELD, J.:

"A legislative grant is an executed contract, and as "such within the clause of the Constitution of the United "States which prohibits the states from passing any law "impairing the obligation of contracts. It cannot, there- "fore, be destroyed, and the estate be divested by any "subsequent legislative enactment. And though a mu- "nicipal corporation is the creature of the legislature, yet "when the state enters into a contract with it, the subor- "dinate relation ceases, and that equality arises which ex- "ists between all contracting parties. And however "great the control of the legislature over the corporation, "it can be exercised only in subordination to the princi- "ple which secures the inviolability of contracts."

A state having made one grant of land, its second grant is void, because it impairs the obligation of a contract.

Staumire v. *Taylor*, 38 N. C., 207, 213.
State v. *Glen*, 42 N. C., 321.
Cornelius v. *Glen*, 42 N. C., 512.

"It has been settled, that a contract entered into be-
"tween a state and an individual, is as fully protected by
"the constitution as a contract between two individuals."

Providence Bank v. *Billings*, 4 Pet., 514.
Louisiana v *Jumel*, 107 U. S., 750.

As was said by Justice Miller, in *Delmas* v. *Insurance Co.*, 14 Wall., 661 (on page 668): "This court has always
"jealously asserted the right, when the question before it
"was the impairing the obligation of a contract by state
"legislation, to ascertain for itself whether there was a
"contract to be impaired. If it were not so, the con-
"stitutional provision could always be evaded by the
"State courts giving such construction to the contract, or
"such decisions concerning its validity, as to render this
"court of no avail in upholding it against unconstitutional
"state legislation."

In *Louisville Gas Co.* v. *Citizens Gas Co.*, 115 U. S., 683, Justice HARLAN (p. 697) said: "Whether an alleged
"contract arises from state legislation, or by agreement
"with the agents of a state, by its authority, or by stip-
"ulations between individuals exclusively, we are obliged,
"upon our own judgment and independently of the ad-
"judication of the State court, to decide whether there
"exists a contract within the protection of the constitu-
"tion of the United States."

The defendant, in its second point (Deft's. Brief, 39), insists that Eagan is a purchaser of this land within the meaning of the second section of the Act of June 22, 1852, and therefore, that the title to said land in the County of Cook, by the first section of such Act should be conveyed to him.

Let us look at the inconsistencies of this proposition.

It cannot be gainsaid, but that the title to the land did pass to plaintiff under the first section of said act. Now if we admit Eagan to be a purchaser under the second section, let us look and see what relations he occupied toward Cook County.

If the title of the county was not free from conditions, as we have clearly shown it to be, the only condition contained in section 2 is, that since the passage of the act of September 20, 1850, in case of a purchase of swamp lands from the United States, it should be lawful for the county to convey such lands to such purchaser, taking his register and receiver's certificate for cash paid, and an assignment of the bounty land warrant paid for such land. The record is barren of any proof, or attempt to prove, that Eagan, or his assigns, ever made an assignment of this register and receiver's certificate and of the military bounty land warrant No. 2,495, to the County of Cook.

It seems strange that mere lawful authority to do this should be construed by any court to be a conveyance of this land. No consideration was paid or tendered by Eagan, or his assigns. If we admitted that section 2 applied to Eagan, neither he, or his assigns, fulfilled any of the conditions in section 2 of the act of 1852, which were requisite to entitle them to demand a conveyance of this land from the County of Cook. The mere right to sell property is not a sale of it. The same confusion exists here in the opinion as exists in its admitting the doctrine of *in præsenti*, and then neglecting to enforce the conclusions which legally follow from such admission.

A brief review of the Illinois legislation so far as it affects the subject-matter of this suit from a little different point of view will not be uninstructive.

The act of June 22, 1852, granted the land to Cook county without any conditions—thereafter, and on October 20, 1853, Eagan made his attempted purchase of the government.

On March 4, 1854, an act amendatory of the last named act was passed which required Cook County ot convey to purchasers from the government; defendant, therefore, urges that the County of Cook was bound to seek out Eagan and give him its title.

This act of 1854 was further amended on February 15, 1855, as follows:

"An Act to amend an Act approved March 4, 1854, in relation to swamp lands.

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That no lands heretofore entered at any land office in this state, and which may have been selected as swamp or overflowed lands, lying within six miles of the line of the 'Illinois Central Railroad shall be sold by the county authorities of the counties in which the same shall be situated, till said selection shall have been approved by the Secretary of the Interior, or other proper officer of the general government, and so certified by the auditor of public accounts, in the manner now provided by law.

SEC. 2. This Act to take effect from and after its passage.

Approved February 15, 1855."

(Ill. Laws 1855, 146.)

This act, in short, provides that no lands selected as swamp lying within six miles of the line of the Illinois Central Railroad shall be sold by the county authorities of the counties in which the same shall be situated "TILL "SAID SELECTION SHALL HAVE BEEN APPROVED BY THE "SECRETARY OF THE INTERIOR."

The selection of the land in question was not approved until May 8, 1866 (Rec., 9), and the Illinois act of 1859 (Ill. Laws, 1859, 202), removed all possible obligation to convey to any one long before the selection was so approved. Now, pursuing the defendant's line of argument as to these acts passed subsequent to the grant of 1852,

it follows logically that there was a period of time amounting to precisely eleven months and eleven days within which Cook County was allowed to make a conveyance to Eagan.

It is utterly at variance with every principle of law to maintain that a public corporation like a county must institute a search for a person answering the description of one to whom it is permitted to convey. It could, on the other hand, be argued with some plausibility that it was the duty of Egan to demand a conveyance of the county, but to sustain such a position it would be essential to show by proper proof that such a demand had been made. No such proof is pretended to have been made in this case. In fact, it is impossible for any one familiar with the facts in the case at bar to escape the conclusion that Eagan well knew when his entry was canceled (Aug. 10, 1855,) that the county was prohibited from making a conveyance of the land to him after the act of Feb. 15, 1855, was in force. How far this knowledge, coupled with his neglect to demand a conveyance from the county during the eleven months and eleven days referred to influenced Egan in his assent to the cancellation of his entry cannot possibly be determined. They, however, serve as side lights to explain his behavior in the matter.

In the trial of an ejectment suit, where the jury is waived, it is competent to submit written propositions of law to be held or refused, to ascertain the grounds upon which the trial judge gives judgment.

Bradish v. *Yocum*, 130 Ill., 386, (see head note 11 and page 391) where the court says: "It is immaterial "whether the complaint is that the court below, in "making its findings, came to a wrong conclusion upon

"the facts or the law, or both. *The inquiry is, did the "facts, as they appear in the record, and the law, author- "ize the finding and judgment below?*"

The plaintiff insists that it has the title to the land in dispute, and that this suit should be reversed.

Respectfully submitted.

EDGAR TERHUNE,
County Attorney of Cook County.

CONSIDER H. WILLETT and
CHARLES B. WOOD,
Of Counsel for Plaintiff in Error.

SUPREME COURT U.S.
FILED
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JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 1406.

THE COUNTY OF COOK,
Plaintiff in Error,
vs.
THE CALUMET and CHICAGO CANAL and DOCK COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

PLAINTIFF'S ANSWER TO DEFENDANT'S SUGGESTIONS.

WILLIAM G. EWING,
COUNTY ATTORNEY OF COOK COUNTY.

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PLAINTIFF'S ANSWER TO DEFENDANT'S SUGGESTIONS.

This suit was reported submitted under rule 20. But investigation shows that "additional suggestions submit-"ted by defendant in error" require attention at my hands.

THE ACT, THE GRANT OF 1852, IS DENIED TO BE A CONTRACT.

It has every element of a contract; proper parties, a good consideration, suitable subject-matter, a lawful enabling act permitting counties to acquire and sell swamp lands, and a meeting of minds consenting to make and to accept the grant.

Tested by the principles governing contracts this grant is a contract. It contains every conceivable element which, united, create a contract.

Defendant suggests such a grant is not a contract because the plaintiff is a public municipal corporation, a county.

No reason is suggested why a county within the scope of its authority may not make contracts as valid and finding as individuals.

The defendant's counsel is forced to admit in this court that the swamp land grant from the Government to the States was a contract.

Such admission carries with it the broad proposition that all legislative grants are contracts. No difference has been pointed out in the grant to the county showing any reasonable or legal distinction between such grant to it and the grant to the state of the same land.

It is "suggested" that the county is an agency of the State, and therefore the grant of the land to the county was a political act, and not a grant, a contract.

And it is argued that the "suggestion" is sound, because the states creates the counties and may destroy them.

Is not the state an agency of the United States in a political sense that the general government uses it as an agency of government, and has control and authority to establish a republican form of government in such State?

The United States has the political power to create new states in a manner not unlike the political power of States to create counties. It has also the power to destroy States.

Let us see where this power resides in the constitution.

"New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress." (U. S. Const., Art. IV, § 2, cl. 1.)

Every one is familiar with the action admitting new states. The only instance of carving a new state out of an old one is West Virginia, which was admitted into the union under act of congress of December 31, 1862. (12 Stat., 633.)

Let us see how counties were created in Illinois in 1854?

The county of Cook was created by an act passed January 15, 1831 (Ill. Laws, 1830, p. 54) and was in existence when the Illinois constitution of 1848 became in force April 1, 1848.

Such constitution in its seventh article provided:

"No new county shall be formed or established by the general "assembly which will reduce the county or counties, or either of them, "from which it shall be taken, to less contents than 400 square miles; "nor shall any county be formed of less contents; nor shall any line "thereof pass within less than ten miles of any county seat of the "county or counties proposed to be divided." § 1.

"No county shall be divided, or have any part stricken therefrom, "without submitting the question to a vote of the people of the county, "nor unless a majority of all the legal voters of the county voting on "the question shall vote for the same." § 2. * * *

"There shall be no territory stricken from any county unless a ma- "jority of the voters living in such territory shall petition for such "division; and no territory shall be added to any county without the "consent of a majority of the voters of the county to which it is pro- "posed to be added." § 4. * * *

"*The general assembly shall provide, by a general law, for a township "organization under which any county may organize whenever a majority "of the voters of such county, at any general election, shall so determine;*

"and whenever any county shall adopt a township organization so "much of this constitution as provides for the management of the fiscal "concerns of the said county by the county court may be dispensed "with and the affairs of said county may be transacted in such manner "as the general assembly may provide." § 6.

We have shown (Plaintiff's brief, pp. 77, 78) that by a vote of the people of the County of Cook, it had adopted township organization before June 22, 1852.

We have cited the constitution of 1848 to show that no change could be wrought in the territory or in the form of the county government of the county by the General Assembly without first submitting such change to the voters of the county for their consent.

It has been the public policy of Illinois, and constantly adhered to, that the legislature could not compel a municipal corporation to incur a debt without its consent. This consent is manifested by a vote.

People v. *Salomon*, 51 Ill., 51.

We may conceded that the legislature need not have permitted counties to have any vested rights in lands which were not needed for public uses. But that does not cover the complaint urged. That it is impossible for the legislature to grant vested rights in private property to counties.

The plaintiff, while admitting that the legislature might withhold such power, that it need never have adopted the enabling act it did, vesting the title to the swamp lands in the counties in Illinois, and might, in this very case, have withheld its gift of swamp lands; yet that having enacted such power, and made such gift, such lands vested in the county, subject to same principles and rights that govern the obligation of all contracts.

That these lands were a gift to the county from the

state makes the title to them in the county no less a vested right than would be a gift of land by an individual to the county.

The state having granted these lands, and the title having vested in the county, the state had no power to divest the title.

Suppose the present legislature, as to other swamp lands still owned by Cook county and worth $1,000 per acre, should pass an act that the holders of Valentine scrip might locate them. Would any one contend that no vested rights had been impaired?

The distinction between the *public* and *private* character of a municipal corporation is very clearly stated by Dillon in his work on municipal corporations (4th Ed., § 66) where the law is stated to be that property acquired by a corporation in its *private* character is not subject to legislative control.

In speaking of the decisions which distinguish the political conditions of municipal corporations and their rights in private property. Cooley on Const. Lim. (6th Ed., 290, bottom of page) says: "They draw a distinction "between the political rights and privileges conferred "on corporations which are not vested rights in "any sense implying constitutional permanency, and "such rights in property as the corporation acquires, "and which in the view of these decisions are protected "by the same reasons which shield similar rights in "individuals."

On the next page (291) he says: "The rights acquired, "either by such grants or by any other legitimate mode "in which such a corporation can acquire property, are "vested rights, and cannot be taken away."

Without constitutional restrictions an office may be abolished, the officers' fees or salary reduced or his term shortened. Yet where such power exists, as to fees or salary earned, they are vested rights, and beyond the power of legislation to change.

Fisk v. *Jefferson Police Jury*, 116 U. S., 131, 134.

In *Bowdoinham* v. *Richmond*, 6 Greenl. (Me.,) 112, headnote reads: "The legislature having, in the act dividing the town of Bowdoinham and incorporating a part of it into a new town by the name of Richmond, enacted that the latter town should be holden to pay its proportion towards the support of all paupers then on expense in Bowdoinham; which it did for two years; after which, on petition of Richmond, another act was passed, exonerating this town from such liability in future, it was *held that the latter act was unconstitutional and void, as it impaired the obligation of the contract created by the original act of division and incorporation.*"

The power to organize, to divide counties and to change their boundaries is a political power which, exercised in a political way is beyond prohibition in existing enactments in the United States Constitution. The same admission in popular language is that counties are created and destroyed by states. Yet such admission is bounded and limited by the exercise of such political power and by state constitutional restrictions; and does not extend to any vested property rights which, are protected by the Federal constitution.

When a county is created the new community and the new territory have political rights exactly like they had in the old county.

This political power in Illinois, after a vote consenting, which covers all the territory and embraces all the people, is merely a regulation of such political rights, and never destroys vested rights in property. Such political power can be exercised and should be exercised in such a way as to disturb no vested private property right.

Could it be contended that it would not impair the obligation of a contract for the legislature of Illinois to pass an act giving lands owned by Cook county to Alexander county?

Yet it would be conceded that if a portion of Cook county were to be lawfully annexed to Lake county that the lands owned by Cook county situated in the territory so annexed to Lake county could lawfully become the property of Lake county.

Yet no transfer of county property can be lawfully made by a legislative act that is not exercising political power in creating counties. It is only a distribution of existing property in proportion to existing rights. Among individuals private rights of a like character are distributed by partition deeds.

Could the legislature transfer the title of land of a county to an individual? No one would so contend.

The right of the state is the right of regulation, and not of appropriation.

An enabling act is necessary for a municipal corporation to hold real property other than for municipal uses.

Such enabling act puts the title to land which is not intended for municipal use upon the same footing as land owned by an individual.

Public property is not taxed, but swamp lands owned by counties have been taxed, and under such taxation

and seven years' payment of taxes with possession or after the payment of such taxes and taking possession of it, divests the title of the county as it does the title of an individual. County of *Piatt* v. *Goodell*, 97 Ill., 84.

A tax upon an agency of the government is void; a tax upon public property in public use is void; but a tax upon swamp lands owned by a county is, as we have seen, valid or at most voidable and not void in Illinois.

The attempt in the lower court to establish a title in defendant by estoppel of plaintiff because the defendant had paid taxes (which attempt has been abandoned in this court), is a defense utterly inconsistent with the claim that this land is not to be treated as private property, which is sprung for the first time in these "suggestions."

To convey the lands of a municipal corporation, a deed, duly executed, is as essential as in the conveyance of lands by individuals.

"A resolution of the board of supervisors cannot "operate as a final conveyance of the title of the county "to swamp lands." (2d head-note) *Tama County* v. *Melendy*, 55 Ia., 395.

In *Com. of Beaufort* v. *Duncan*, 1 Jones, N. C., 239, the ordinance construed was in the following words: "Ordered that for the future, whatever small strips of "land are to be found between the outward lines of "Front street and the water, shall be the property of the "persons owning the front lot on the opposite side of the "street."

BATTLE, J., said (p. 281): "It is very certain that "this ordinance could not operate as a deed to pass the "title, *proprio vigore*, for the want, among other things, "of the seal of the grantors, and of a consideration from

"the grantees, even supposing them to be properly des-
"ignated. But the counsel for the defendants contends
"that the ordinance operated at least as color of title, so
"that seven years adverse possession under it would per-
"fect their title. To constitute color of title there must
"be some written document of title professing to pass the
"land." * * *

"Viewing the ordinance in the light of a conveyance,
"we think it so obviously defective that it could not have
"misled a man of ordinary capacity. Besides the want
"of a seal and a consideration, it is altogether informal,
"and does not appear ever to have been delivered to the
"pretended donees. The last is a decisive and fatal ob-
"jection, without adverting to any others, because de-
"livery is essential to give effect to any instrument of
"conveyance *inter vivos*, and must, in the very nature of
"things, be as necessary where the instrument is to ope-
"rate only as color of title, as when it is to convey a
"complete title."

There is no pretense that defendants' grantors ever had a deed to this land from Cook county. It is not claimed any attempt was ever made by the plaintiff to convey this land. No consideration has been paid or tendered the county. The legal title to this land, if it ever vested in the plaintiff, remains in it, undisturbed by any acts of the county authorities of Cook county.

Counties are creatures of statutes. We have seen that states are also creatures of statutes. Counties are agencies of the state; so are states agencies of the government. The governing power is known as political power, and has no limitations, unless self-imposed in the adoption of organic or creative acts. Therefore, the maxim that no vested rights can be acquired in political power.

The county has the capacity in the limited mode prescribed in its organization to make contracts capable of enforcement, as all contracts are enforced. It may sue and be sued like natural persons. Its duties and obligations as to such contracts are governed by the same legal principles that govern all contracts. The conclusion should be reached that private property acquired by a county is a vested right. Such conclusion does not impair the principle that in political power no vested rights exist.

We will examine the cases cited in defendant's "suggestions." In *Emigrant Co.* v. *Wright County*, 97 U. S., 339, a sale of swamp lands procured from a county by fraud and for an inadequate consideration was set aside in chancery. This case sustains our position for it treats the swamp lands granted to the county as private property.

In *Richland County* v. *Lawrence County*, 12 Ill., 1, an act creating Richland county from Lawrence county did not give the new county any share of a fund belonging to counties that had no railroad or canal passing through them, and a subsequent act making a proper apportionment of such fund was sustained.

TRUMBULL, J., in the opinion (page 8) uses this language: "That the state may make a contract with, or "a grant to a public municipal corporation, which it could "not subsequently impair, is not denied."

In *Sangamon County* v. *Springfield*, 63 Ill., 66, an amendment to the charter of Springfield, provided that road taxes collected upon the property within the city should be paid by the county to it. Springfield being required to take care of all her streets.

The case of *Sup. Whiteside Co.* v. *State's Atty.*, 31 Ill., 68, does not sustain defendant's contention. It refused to compel the use of the fund arising from their sale to be devoted to no other object than reclaiming swamp lands, an enabling of the state permitting a different use. It expressly decided that the counties had exclusive control over swamp land within their limits and over their proceeds.

We do not see how the decisions in these cases contemplate or support the confiscation by the State of the private lands of the County of Cook.

They do not sustain the statement that a county cannot have vested rights in its private property.

They do not demonstrate that a legislative grant of land is not a contract.

In the construction of a contract, though it be a statutory grant, the construction of the State court is not binding upon this court.

If the rule were otherwise, a State court would by a wilful, an absurd or a strained ruling have the power to oust this court of the jurisdiction given it by the constitution.

This court then is untrammeled by any view the State court may entertain of a transaction which is in fact a contract.

The only words of the act of 1852 which granted land to Cook county or related to Cook county in any way are found in its first section. And defendant's counsel are forced to the concession that such statement is true. Yet, while conceding this, they couple it with the idea that the conditions of the act of 1854 were also the conditions of the act of 1852. Let us look at such supposed conditions.

What is the language under consideration?

"WHENEVER IT SHALL APPEAR THAT ANY OF THE "LANDS GRANTED TO THE STATE BY THE AFORESAID ACT "OF CONGRESS (the first section contained the full title of the act "[9 Stats., 519] of Congress of September 28, 1850) SHALL HAVE "BEEN SOLD BY THE UNITED STATES *SINCE* THE PAS- "SAGE OF THIS ACT, IT SHALL BE LAWFUL FOR THE SAID "COUNTIES TO CONVEY SUCH LANDS TO THE PURCHASERS "THEREOF."

These are the only words that can be construed to create and attach conditions to the admitted absolute grant to the county by the first section of such act of 1852. At first blush, in such language, no one could discover conditions to defeat such grant without the grantee's consent.

A critical investigation leads to the discovery of no conditions, but a simple enabling act to make lawful a conveyance to a party who has acquired a title adverse and inferior to the title of the county.

The language of the contract is the first section of this act of 1852, and not the language last quoted. It is the contract of such first section, the obligation of which is impaired by the act of 1854. This court will construe such contract, and will not be bound by the construction given by the state courts.

To determine whether or not a contract exists, the obligation of which could be impaired, is a jurisdiction primarily imposed upon this court by the Constitution.

If the construction is put upon the first section of the act of 1852 that it was a grant, and therefore a contract, we need never reach an argument to show the proper meaning of the word "*since*," as used in the second section of the act of 1852.

We feel that defendant's "suggestions" should fall by the very "suggestions" made to support them, yet we do not wish our silence to be construed as assenting to any of their subtleties.

The entire controversy here turns upon the meaning of the word "since," as used in the second section of the act of 1852.

We are to use this word in this statute as though it were in the contract of individuals.

Its primary, plain and ordinary meaning must attach to its use in the statute.

Let us turn to Webster's dictionary and copy its constant and common use: "Since adv. 1. From a definite "past time until now; as, he went a month ago, and I "have not seen him since. 2. In the time past, count-"ing backward from the present; before this or now: "ago."

Now, let us go back in memory to June 22, 1852, and apply this definition of the adverb "since" to that act. It qualifies and explains the verb "shall have been sold." And it limits the application of that portion of section 2 which we have quoted and italicized above to sales of swamp lands by the United States between September 28, 1850, and June 22, 1852.

The facts of this record show that the conditions of this second section did not attach to the land in question upon the passage of this act.

Such construction is the clear and plain one, about which no room is left for doubt or argument. Any other construction is a forced and strained one, which ejects a hidden meaning into the statute, that no member of the legislature intended when he voted for its passage.

The legislature of Illinois by its subsequent action in re-enacting this provision in substantially similar language in the act of March 4, 1854 (§ 3, Ill. Laws 1854, p. 19), acknowledged that the act of 1852 only applied to sales made by the government before its passage.

(The acts have been already quoted. Act March 4, 1854 [Ill. Laws 1854, p. 184], is quoted on page 79, plaintiff's brief, and gave the Board of Supervisors of Cook county the same power that County courts were given by act of 1852. The act of March 4, 1854 [Ill Laws 1854, p. 19], is in an insert on said p. 79.)

For clearness we quote such portion of the act of March 4, 1854, under which, by any possibility, the defendant can claim title.

"In all cases where any of the lands granted to the counties by the "* * * [act of June 22, 1852,] have been sold by the United States "*since* the passage of the act of Congress entitled 'An act to enable the "State of Arkansas and other states to reclaim the swamp lands with-"in their limits,' approved Sept. 28, 1850, the *County courts* of the sev-"eral counties in this state shall, by an order to be entered of record at "any regular or special term, sitting for the transaction of county busi-"ness, make all necessary orders for securing to the purchasers who "have purchased swamp and overflowed lands situated in their respect-"ive counties, SINCE THE PASSAGE OF THE ACT OF CONGRESS AS "AFORESAID, in pursuance and in the manner prescribed by the act of "the General Assembly of this state, to which this is an amendment." (§ 1, Ill. Laws 1854, p. 19.)

"The board of supervisors, in counties that have adopted township "organization, are hereby vested with all the powers, and MAY MAKE "ALL ORDERS and regulations that County courts are authorized to "make and receive by this act." (§ 2, *Ib.*)

In passing we wish to suggest that the words "may "make all orders," italicized in the last statute are not mandatory, but simply words of an enabling statute which merely give power to convey upon consideration, and in the discretion of the county authorities. There is no *coercion* to convey, but the county authorities *consenting*, they may convey their perfect title to the holder of an adverse defective one.

It has been successfully shown (Plaintiff's brief, 24), that *legislative grants are present absolute grants vesting and conveying title upon the day such legislative acts become statutes.*

It has been shown that the language of the first section of the swamp land act (9 Stats., 519), and the first section of the act of 1852, are identical; the one conveying the land from the United States to the State of Illinois, and the other conveying the land from the State of Illinois to the County of Cook.

Such act of Congress and such act of the legislature adopted language from older statutes which had been construed to be legislative grants passing immediately a title in fee simple to the lands granted. The use of such language adopted such construction of many similar and older statutes.

And it is not going too far to say that in the chain of title to this land, the same construction which the United States Supreme court subsequently put upon the statute conveying the land to the State should be adhered to in the use of identical words in the state statute conveying the same land to the county.

Cooley Const. Lim., (6 Ed.) 66, and note 1.
Fisher v. *Deering*, 60 Ill., 114.
Rigg v. *Wilton*, 13 Ill., 15.

In *Campbell* v. *Quinlin*, 4 Ill., 288, first head-note reads: "when a state enacts a statute of another state, "it is presumed to adopt the construction which that "statute has received, * * * in the courts of the "state from which it is taken." This principle was sustained by an opinion in A. D. 1841 of Justice Douglass.

In *Tyler* v. *Tyler*, 19 Ill., 151, SKINNER J. (p. 155)

said: "Where a statute of the mother country or of a "sister state is adopted into our law, the rule is, that with "it is adopted the construction of such statute which, "prior to its adoption, uniformly obtained."

In *Freese* v. *Tripp*, 70 Ill., 496, the seventh head note reads: "Where the statute of another state is adopted, "it will be presumed that the prior construction placed "upon it by the highest court of such other state, is also "adopted." And this principle is fully sustained by the opinion (p. p. 500, 501) of Chief Justice Breese.

The doctrine of *in præsenti:* that the lands are conveyed of the date of legislative grants without patents is conceeded. It follows as day the night from this concession that the acts of Congress and of the State are to be construed, as previous legislative grants had been, and so a perfect title to the land vested in Cook County under the act of 1852, without condition.

We claim that the conditions in the act of 1852 are confined to sales of swamp lands made by the United States since the conveyance of such swamp land September 28, 1850, to the State of Illinois and prior to the date of the passage of such act, June 22, 1852.

The "suggestions" assume that conditions attached to the grant to the County of Cook, which the statutes of Illinois, to which reference has been made, show, is not a fact.

The defendant's counsel seek to avoid the force of the doctrine of cancellation by suggesting (Defendant's suggestions, p. 9): "The only question that was in fact de- "cided by the State court and before it for decision, in "reference to the Eagan entry, was as to whether Eagan "was a purchaser from the United States within the

"meaning of the second section of the act of the legis-"lature of Illinois, of June 22, 1852, and of the amend-"atory act of March 4, 1854." The issue thus put brushes away the real questions involved in the decision. It ignores what must ever attend the solution of the question put, that the grant of the act of 1852 was a contract and that the amendatory act of March 4, 1854, attempted to impair the obligation of such contract. The question forgets the established doctrine of this court, that in the construction of contracts in statutes this court will construe for itself such contract, and will not be bound by the construction of the State court.

That Eagan was a purchaser from the United States of the land in question will not bear the scrutiny of judicial examination.

If Eagan was a purchaser from the United States, as is claimed by counsel, it must be because he had agreed to purchase, and the government, through its agents, had agreed to sell him the land in question, and the undertaking of the parties must have been about as follows:

Eagan undertakes, 1, to purchase the land at a fixed price; 2, to furnish a legally issued bounty land-warrant in payment.

The government undertakes, 1, to sell the land at the price named; 2, to receive in payment a legally issued bounty land-warrant; reserving to itself the right to determine the question of such legality.

It is therefore apparent that the only thing left to be done by Eagan, after this meeting of minds, was to hand over to the government a legally issued bounty land-warrant and thus become a "purchaser" of the land—but he did not do this.

The government, upon receiving the bounty land-warrant, decides against its validity and notifies Eagan of its election to rescind the contract, and Eagan assents to the rescission. Thus Eagan fails to become a purchaser and the government remains (as against every one but this plaintiff) the owner of the premises in controversy for a period of fifteen years, when Bunn, another utter stranger to the title, presents himself and offers to purchase the land, the government accepts his offer and issues a register and receiver's certificate to him which, being assigned to Bowen, the land department issues a patent November 15, 1870.

Such is the history of Eagan, Bunn and Bowen in connection with this title.

An indorsement on the duplicate register and receiver's certificate, introduced in evidence (shown on p. 87, plaintiff's original brief), states that Eagan's entry was "reinstated February 15, 1883." And we urge that such "reinstatement," by whomsoever made, was *coram non judice*, and absolutely void, as after the issue of such patent there was a total want of authority in the government or its officers to take *any action whatever* in respect to this land, irrespective of whether the Bowen patent was valid or not.

We think we have clearly shown already that the decision of the State court could not have been made without deciding a question giving jurisdiction to this court. The decision of the State court was not made as in the case of *Johnson* v. *Risk*, U. S. Supreme court opinion filed December 8, 1890, where the Statute of Limitations was the only necessary question involved. The cases of *Hoadley* v. *San Francisco*, 94 U. S. 4 and 124 U. S., 630, have no application to the facts of this record.

Let us look at the facts which show that the cancellation of the Eagan entry gives this court jurisdiction. The plaintiff, by its 15th proposition of law, asked the trial court to hold (Rec., 25) "the cancellation of the "Eagan entry, August 10, 1855, by the Department of "the Interior of the United States, in the absence of any "facts or evidence showing the circumstances which led "to its cancellation must be presumed to have been based "upon sufficient facts to authorize it;" which the court refused.

And the finding of the court was in accordance with such refusal, as shown by defendant's proposition 10. (Rec., 28.) The decision fully sustains these propositions of the trial court and declared in emphatic language that the cancellation of the Eagan entry was absolutely void.

Again, by the defendant's third proposition (Rec., 26), the trial court held for defendant that Eagan was the owner in fee of said land, ignoring the cancellation of his entry. And again, defendant's second proposition (Rec., 26) held that the United States had appropriated the land by selling to Eagan, ignoring said cancellation and ignoring the confirmation of such land under the act of March 3, 1887. (11 Stat., 251.)

The statement often made "that there was no cancel-"lation in fact of the entry, but simply a cancellation of "the location of the defective warrant," needs no attention when addressed to a tribunal familiar with the methods of procedure in the General Land Office.

The presumptions that every officer does his duty until the contrary is proven, sustains this cancellation.

In conclusion let us take a brief survey of the positions presented by this record.

1. The doctrine of *in præsenti:* that legislative grants convey an immediate title upon the date of their passage, is admitted to be established beyond controversy. And the plaintiff's claim that this principle of law being properly applied to the facts eliminated all other questions from the record, has not been denied.

2. It stands admitted that the plaintiff proved title in itself by the certificate of the commissioner of the general land office, and by the state auditor's certificate.

3. It stands unquestioned that the confirmatory act of Congress of March 3, 1857, was a further assurance of title. One of the plain grounds upon which this rests is the fact that the Eagan entry was canceled August 10, 1855.

4. If the defendant has an equitable title to the land (which we have demonstrated that it has not), then it admits our position to be sound, that in ejectment it cannot defeat our title under the act of September 28, 1850.

The Eagan entry, if uncanceled, was evidence of title, commencing October 20, 1853, and the plaintiff's certificates were evidence of title commencing September 28, 1850.

Under these dates the Egan title must fail at law; and if it has any validity in equity, it must be supported by an equitable proceeding.

5. The only effect that the Bunn entry of May 24, 1870, can have is found in the fact that Bunn assigned his certificate to James H. Bowen October 3, 1870, to whom *the United States issued a patent November* 16, 1870.

Where the land department issues a patent to land the legal title passes from the government.

And whether the patent conveyed title or not, and whether rightly or wrongly issued, the moment it is issued, all power and authority over such land ceases in the land department.

The issuing of the Bowen patent took away all jurisdiction over this land once existing in the land department, so that its action in reinstating the Eagan entry February 15, 1883, after the commencement of this suit, was beyond the jurisdiction of the land department and void.

6. The cancellation of the Eagan entry, August 10, 1855, was within the jurisdiction of the commissioner of the General Land Office, as is clearly demonstrated in plaintiff's reply brief. The fact of such cancellation takes the Eagan entry out of the record. Because the decision of the trial court and the Illinois Supreme court denied the power of the commissioner to make such cancellation, and treating it as void, gives this court jurisdiction, if it did not exist in other ways.

7. The decision was not based upon a ground that did not embrace a question giving Federal jurisdiction. The judgment could not have been rendered without denying the right claimed under acts of Congress or authority exercised under them or without sustaining and enforcing an act of the Illinois legislature impairing the obligation of a contract.

8. By silence, all that has been said concerning the six-mile limits is indorsed by defendant's counsel.

We would emphasize the point of practice in ejectment in Illinois that when a suit is submitted to the court and a jury waived, no propositions of law need be presented, and the trial court entering judgment upon the facts and

the law, such facts and law will be reviewed in the Supreme court.

Bradish v. *Yocum*, 130 Ill., 386, 391.

So in this court, it should, like the Supreme court of Illinois, look into the facts of the record and the law applicable, and decide this title upon its merits.

Respectfully submitted.

WILLIAM G. EWING,
County Attorney of the County of Cook.

CONSIDER H. WILLETT and
CHARLES B. WOOD,
Of Counsel for Plaintiff in Error.

Supreme Court, U. S.
FILED,
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JAMES H. McKENNEY,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 1406.

THE COUNTY OF COOK,
Plaintiff in Error,
vs.
THE CALUMET AND CHICAGO CANAL AND DOCK COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

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STATEMENT.

To aid the court in the examination of this case, we make a statement of the facts which are necessary to be considered.

The County of Cook, a municipal corporation of the State of Illinois, as plaintiff, on the 31st day of January, 1883, brought an action of ejectment in the Circuit court of Cook county, against the Calumet and Chicago Canal and Dock Company, a corporation of Illinois, as defendant, to recover the S. W. ¼ of Sec. 7, N. I. B. L., Township 37, Range 15, East of the 3d P. M., containing 46 48/100 acres of land, except a small part thereof which is held for a railroad right of way.

The final trial of the cause resulted in a judgment for the defendant, and this judgment on writ of error was affirmed by the Supreme court of the state. The plaintiff brings it to this court by a writ of error alleging that various federal questions have been erroneously determined by the Supreme court of the state, and that this court has authority to review them.

The land in question is situated within six miles of the Illinois Central Railroad as located (Testy. of Nocquet, Trans., 21). Being part of an odd numbered section, the act of Congress of September 20, 1850, which granted to the State of Illinois for railroad purposes the even numbered sections within six miles on either side of that road, fixed its minimum price at $2.50 per acre. On the passage of this act, a reservation was made by the order of the president of the land fifteen miles in width on each side of the location of this railroad; and in accordance with this order, specific directions were given on the 19th and 20th of September, 1850, by the Commissioner of the general land office to the Register and Receiver to withhold certain lands, including the land in question, from sale or entry of any kind, until they should be again made subject to private entry or location by proclamation of the president. (Letter of Commissioner, Trans., 13.)

By proclamation dated the 3d of April, 1852, these lands were restored to market and thereafter the lands within the six-mile limits not enuring to the state for railroad purposes were offered by the Government at public sale, not withstanding the adoption of the act of Congress of September 28, 1850, known as the "swamp 'land act."

By this act, which was entitled "An act to enable the "State of Arkansas and other States to reclaim the

"swamp lands within their limits," Congress granted to the State of Illinois all the swamp and overflowed lands lying within its borders, which then remained unsold, and provided for its segregation and the issue of patents to the state therefor. (9 Stat., 519.)

On the 22d of June, 1852, the State of Illinois passed an act, granting to the several counties in which the swamp lands might be situated, the swamp and overflowed lands granted to it by the said Act of Congress. For the consideration of this cause, the following are the material clauses of this act:

SECTION 1. "That all the swamp and overflowed lands granted to the State of Illinois, by the Act of Congress * * * approved September 28, 1850, be and the same are hereby granted to the counties respectively in which the same may lie and be situated for the purpose of constructing the levees and drains to reclaim the same; and the balance of said lands. if any, shall be * * * distributed in each county equally among the townships thereof for the purposes of education, or the same may be applied to the construction of roads and bridges or to such other purposes as may be deemed expedient by the courts or county judges hereinafter mentioned desiring so to apply it."

SEC. 2. "Whenever it shall appear that any of the lands granted to the State by the aforesaid act of Congress shall have been sold by the United States since the passage of this act, it shall be lawful for the said counties to convey said lands to the purchaser thereof. The said deed of conveyance shall be made by the judges of the County court as such * * * and on delivering said deed to the purchaser the county judge shall take from him an assignment of all his rights in the premises, and as such assignees they shall be authorized to receive from the United States the purchase money of such land; and whenever any lands embraced by the said act have been located by bounty land warrants since the passage thereof, it shall be lawful for such county in which the same

are situated to convey the same in manner aforesaid to the person or persons who located said warrant and to take an assignment of the same to them as county judges. * * *" (Session Laws 1852, p. 178.)

On October 20, 1853, William B. Egan located Military county land warrant No. 2,495 for forty acres upon the land in question, and paid in cash the amount necessary to fully complete the purchase price thereof, and he received the usual Register's and Receiver's certificates therefor. (Rec., 11 and 12.)

NOTE: From the memorandum of the Register, endorsed upon the duplicate certificate on file in the general land office (Trans., 12), it appears that the cash payment was made by Egan on February 28, 1853; but the certificate of the entry bears date the 20th of October, 1853.

October 29, 1853, after this entry and the receipt of this certificate, this land was certified by the Surveyor General as swamp or overflowed lands within the meaning of the act of Congress of September 28, 1850, and as enuring to the State of Illinois under that act; and a copy of this certificate was sent to the register (at Springfield). (Trans., 8, 9.)

March 4, 1854, the act of the legislature of the State of Illinois, passed June 22, 1852, was amended. So much of said amendment as is necessary to be considered here is as follows:

SECTION 1. "That in all cases where any of the lands granted to the counties by the act to which this is amendatory have been sold by the United States since the passage of the act of Congress, entitled 'An act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits,' approved September 28, 1850, the County courts of the several counties in this state shall, by an order to be entered of record at their regular or special term, sitting for the transaction of county business, make all necessary orders for the secur-

ing to the purchasers who have purchased swamp and overflowed lands situated in their respective counties, since the passage of the act of Congress as aforesaid, in pursuance and in the manner prescribed by the act of the General Assembly of this state, to which this is an amendment; provided that the County courts may, in their discretion, require the purchasers aforesaid to pay to the drainage commissioners for the use of the said county, the cash at the rate they purchased the land from the United States within the time to be specified by said court by an order entered of record as aforesaid; and on failure on the part of such purchasers to comply with the terms of said court as specified by this act, the swamp and overflowed lands purchased by the United States as aforesaid may be sold by the County courts, or drainage commissioners as other swamp and overflowed lands are sold." (Session Laws of 1854, p. 19.)

In April, 1854, Egan made conveyance of this land to Henry S. Monroe; his deed being duly recorded. (Trans., 18.)

On the 2d of March, 1855, Congress passed an act, entitled "An act for the relief of purchasers and locators "of swamp and overflowed lands," the first section of which provides:

"That the President of the United States cause patents to be issued as soon as practicable to the purchasers locating or locators who have made entries of the public lands, claimed as swamp lands, either with cash or with land warrants, or with scrip, prior to the issue of patents to the state or states as provided for by the second section of the act approved September 28, 1850, entitled 'An act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits,' any decision of the Secretary of the Interior or other officer of the government of the United States to the contrary notwithstanding * * * ."

Section 2 provided that upon due proof by the state that any of the lands purchased were swamp lands within

the true intent and meaning of the act of September 28, 1850, the purchase money shall be paid over to the state in which the land was situated.

August 10, 1855, Egan's entry by the land warrant, No. 2,495, was suspended for an erasure in the land warrant or in its assignment (Trans., 12); and the word "canceled" was apparently written across the face of the certificate of entry, which was on deposit in the land office.

NOTE: The memorandum endorsed on the certificate of entry on deposit in the land office (Trans., 12) is as follows: "W't susp., however, for erasure; party desires its location canceled. See Reg. "(Chicago) letter of May 28, 1855, canceled therefor, and *party allowed "to relocate with another W't.* No. 101,043, Aug. 10, 1855."

From this it is evident that so far as Egan was concerned, the transaction that is stated in this memorandum of August 10, 1855, was a substitution of warrant No. 101,043 for warrant No. 2495, which was suspended for some erasure. Egan had, therefore, deposited two warrants, Nos. 2495 and 101,043, in location of this land, and had paid the necessary money in addition for its purchase; but the final order of the commissioner substituting warrant 101,043 for 2495, was not made until February 15, 1883.

By act of Congress passed March 3, 1857, it was declared that the selection of swamp and overflowed lands granted to the several states heretofore made and reported to the Commissioner of the general land office, so far as the same shall remain vacant and unappropriated and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed and shall be approved and patented to the several states; provided that nothing in this act shall interfere with the provisions of the act of March 2, 1855, for the relief of purchasers and locators of swamp and overflowed lands.

May 24, 1870, John W. Bunn entered this land and re-

ceived a certificate of entry from the Register and Receiver at the Springfield land office. On the 8th day of October, 1870, he assigned his certificate to James H. Bowen, and on the 15th day of November, 1870, a patent issued upon this entry to Bowen as the assignee of Bunn.

Afterwards on May 11, 1871, Henry S. Monroe, to whom Egan had conveyed in 1854, sold and conveyed the land to Bowen, and on the first of January, 1872, Bowen conveyed the land to the defendant. (Trans., 18 to 20.)

On the trial in the Circuit court of Cook County, in 1888, it was shown by the defendant that the land was taxed each year from 1870 to 1886, for county and state purposes, and these taxes, amounting to nearly $8,000, were from time to time paid by the defendant. (Trans., 22.)

February 15, 1883, the Commissioner of the general land office, on the application of the attorney of the defendant, reinstated the original location by Egan; and made final order authorizing the substitution of warrant No. 101,043 for the defective warrant No. 2,495, and this entry was certified to by the Register of the land office at Springfield. (Trans., 11, 12.)

On the trial of this cause in the Circuit court of Cook county, a jury was waived and the cause was submitted to the court for its findings on the evidence introduced. The plaintiff in error, in support of its claim of title, introduced in evidence a certified copy of the certificate of the surveyor general, of October 29, 1853, that this land was swamp or overflowed lands within the meaning of the act of Congress of September 28, 1850 (Trans., 8); and also a certificate of the State Auditor (Trans., 9, 10) showing the selection by the state of this land prior to the passage and approval of the confirmatory act of Congress

of March 3, 1857, and the approval of the list of selections by the Secretary of the Interior May 8, 1866, "subject to any valid legal rights that may exist to any of the "tracts therein described;" and on that evidence rested its claim of title. The defendant introduced in evidence the register and receiver's certificate to Egan of October 20, 1853, and showed title by mesne conveyances from him. It also showed that the land was within six miles of the Illinois Central railroad location, and was reserved from sale by the president's direction on September 20, 1850. It also offered in evidence the certificate of entry that issued to Bunn, and the patent to Bowen, his assignee, and the assessment and payment of taxes as above stated.

A consideration of this evidence and of the special findings, which were made by the *nisi prius* court upon the propositions, which were submitted to it by the parties, and which will be found on pages 23 to 28 of the transcript, will make clear the questions, which were raised and presented, and which were in fact determined by the Supreme court of Illinois in the decision to reverse which this writ of error is prosecuted.

By the fifth finding, (Trans., 23,) made at the request of the plaintiff, the court determined that the title to the land in question vested in the State of Illinois as of the date of the original act of Congress of September 28, 1850, by virtue of that act, and the subsequent selection and certification of the land under it. In other words that the act of Congress was a conveyance *in præsenti*; and the fourth, sixth, seventh and eighth findings on the plaintiff's propositions of law (Trans., 23-24), and the refusal of the first of the defendant's propositions of law (Trans., 26) are all in conformity with this holding. This finding is also distinctly affirmed in the tenth finding held

at plaintiff's request (Trans., 25), the first clause of which is as follows: "Under the evidence in this cause the title "to the land in controversy being swamp land passed by "the grant of September 28, 1850, known as the Swamp "Land act to the State of Illinois."

The latter clause of this tenth proposition of law treats of the effect of the act of the legislature of Illinois, approved June 22, 1852, and holds that it is also sufficient to transfer title of its own force and without any patent or other formal deed executed by the state to the county.

From the findings it is therefore evident that the *nisi prius* court distinctly recognized and held that the plaintiff in error had made a *prima facie* case of title and right to recover this land, and its remaining findings deal with the case which the defendant made in opposition to the plaintiff's *prima facie* case.

The decision and judgment of the *nisi prius* court turned entirely upon the effect of the Egan entry and purchase of this land on October 26, 1853. This appears from the ruling of the court granting the second, third and fourth propositions of law, which were submitted by defendant, as follows:

Second. "That the entry of said land by William B. "Egan on October 20, 1853, and the receipt and reten- "tion by the United States of the money and warrant de- "livered by said Egan in payment therefor was a sale by "the United States of said land to said Egan and an ap- "propriation of said land by the United States within the "intent and meaning of the confirmatory acts of Con- "gress." (Trans., 26.)

Third. "That said William B. Egan was the owner "of said lands in fee, and that the defendant in this case

"as assignee of said Egan by regular conveyances made "prior to the commencement of this suit, was at the time "of the commencement of this suit the owner of said "lands in fee and entitled to the possession thereof." (Trans., 26.)

And the reason for this holding is shown by the fourth finding, made at the request of the defendant, which is in these words:

Fourth. "That under the Act of the Legislature of "Illinois of June 22, 1852, in relation to swamp lands, "and under the Act amendatory thereof, of the Legisla- "ture of said state, of March 4, 1854, the county of Cook "could not become the owner of said land as against "Egan or his grantors until said county of Cook should "comply with the requirements of said acts as to pur- "chasers of swamp lands from the United States subse- "quent to the enactment of the Swamp Land Act of "September 28, 1850, and that the burden was upon the "said county of Cook, plaintiff herein, to prove affirma- "tively such compliance." (Trans., 27.)

In substance, therefore, the decision of the *nisi prius* court was that, though the state got title from the general government, the county of Cook did not get title, or certainly any beneficial title from the state, and therefore could not recover; and the reason stated for holding that the county did not get a beneficial title from the state, is that the second section of the act of the Legislature of Illinois, passed June 22, 1852, provides that lands which "shall have been sold by the United States since the pass- "age of this act," shall go to the purchasers and not to the county, and the county should only have the right to get from the general government what the purchasers had paid for them; and that this land was sold to Egan

"by the United States" after September 28, 1850, within the meaning of this act and of the further act covering the same subject-matter, passed March 4, 1854, and therefore the beneficial interest in the land in question did not pass from the state to the county.

We have stated the findings of the *nisi prius* court at this length, because the only questions which were presented by the plaintiff in error to the Supreme court of Illinois for its decision, and which were decided by it, were as to the propriety of these findings. (See plaintiff's assignments of error in the Supreme court of the State, Trans., 28.) And the Supreme court of Illinois affirmed the judgment of the *nisi prius* court for the defendant for precisely the same reasons that impelled its entry in the Circuit court. In its opinion the court holds with the Circuit court, that "the evidence introduced by "the plaintiff was sufficient to establish *prima facie* a "title upon which a recovery might be had." (Trans, 37); but it holds that by the second section of the act of the Legislature of June 22, 1852, the State of Illinois made it a condition and qualification of its grant of the swamp lands to the respective counties, that the grant should not cover any lands that should be entered and purchased from the United States; that "the State of "Illinois never intended to transfer to the counties lands "that had been entered from the United States, but on "the other hand the object was to protect the title of all "purchasers," and that "a positive duty was imposed to "transfer such title as it (the county) acquired to the "purchaser from the United States, and a county could "acquire no rights to the lands by a refusal to observe "the requirements of the statute."

The court states at length the second section of the act of the Legislature of June 22, 1852, and the substance

of the amendatory act of March 4, 1854, and refers to the two acts, which were passed by Congress subsequent to the one March 2, 1855, the other March 3, 1857, as being adopted with the same purpose and object in view, of protecting the title of purchasers of swamp lands. The gist of the opinion is as follows, (Trans., 39):

"It is thus manifest from the legislation of Congress and the legislation of the state that it has always been the intention both of the General government and of the state to protect the title of a purchaser of swamp lands. Congress, in making the grant to the state, had the right to impose such terms and conditions as it saw proper, and the state, in granting the lands to the counties, had the undoubted power to provide that purchasers who had bought and paid for the lands should be protected in their several purchases, as, in effect, it did. The county of Cook derived its title to the land under and by virtue of the act of 1852, as amended in 1854, and if the acts do not pass the title to the land in question it is plain that Cook county could not recover. The first section of the act of 1852 is general in terms, granting all swamp lands which had been granted to the state to the respective counties, but section 2 qualifies section 1 and declares that whenever it shall appear that any of the lands granted to the state shall have been sold it shall be lawful for said counties to convey such lands to the purchasers thereof. This was followed by an amendment, passed in 1854, requiring the County courts, by an order to be entered, to make all necessary orders for securing to purchasers of swamp lands their titles to such lands. Under this legislation it is manifest that the State of Illinois never intended to transfer to the counties lands that had been entered from the United States, but, on the other hand, the object was to protect the title of all purchasers. The language, "It shall be lawful for the said counties to convey," did not leave a discretion with the county to hold the land or convey, as it might think proper, but a positive duty was imposed to transfer such title as it acquired to the purchaser from the United States, and a county could acquire no rights to the lands by a refusal to observe the requirements of the statute. Indeed, we think it a fair and reasonable construction of

the acts of 1852 and 1854, when considered in connection with the acts of Congress, to hold that where lands had been bought in good faith trom the United States the title to such lands did not become vested in the county but passed to the purchaser, under his entry."

It is therefore clear that the Supreme court of Illinois decided against the plaintiff and in favor of the defendant solely by reason of its construction of the conditions and provisions which the state had attached to its grant. "* * * The state, in granting the lands to the "counties, had the undoubted power to provide that pur- "chasers who had bought and paid for the lands should "be protected in their several purchases, as, in effect, it "did. *The county of Cook derived its title to the land "under and by virtue of the act of 1852, as amended in "1854, and if the acts do not pass the title to the land in "question, it is plain that Cook county could not recover.*" It held that Egan was a purchaser within the meaning and protection of the conditions attached by the state to its grant, and therefore no beneficial title passed to the county. We shall therefore contend that no question was raised and presented in the State court for decision, which would give this court jurisdiction on this writ of error to review the judgment of the State court; and that no such question was decided by the State court, directly or by implication. That the judgment of the State court was wholly based on its construction of the terms and conditions of the state's grant, under which the plaintiff claimed title; and that this court should dismiss this writ of error for want of jurisdiction on this record to review the judgment of the State court.

We shall further contend that there was no error in the judgment of the State court, and that the plaintiff is not entitled to recover this land, and the judgment should be affirmed.

BRIEF OF POINTS AND AUTHORITIES.

I.

NO QUESTIONS WERE RAISED OR PRESENTED IN THE STATE COURT OR DECIDED BY IT, WHICH WOULD, UNDER § 709 OF THE REVISED STATUTES, GIVES THIS COURT JURISDICTION TO REVIEW THE JUDGMENT OF THE STATE COURT; AND THE WRIT OF ERROR SHOULD BE DISMISSED.

It must affirmatively appear that the question did arise, and that the State court actually decided the question, or that its decision was necessary to the judgment.

Crowell v. *Randall*, 10 Peters, 392, 398.
Bolling v. *Lersner*, 91 U. S., 594.
Brown v. *Colorado*, 106 *id.*, 95.
Railroad Co. v. *Guthard*, 114 *id.*, 136.

The decision of the State court was purely a construction of the terms and provisions of the Act of the Legislature of June 22, 1852, and did not involve any question of its validity or that of the amendatory act of March 4, 1854.

Commercial Bank v. *Buckingham* 5 How., 317.

(*a.*) No questions were raised in or decided by the State court as to nature of Swamp Land Grant of Act of Congress of September 28, 1850, nor as to effect of Act of Congress of March 3, 1857.

(*b.*) No title was claimed by plaintiff under action of Commissioner of the Land Office cancelling Egan certificate.

No question as to validity of such act was raised in

State court; and the question before that court was of construction of the state statute, not involving its validity.

McBride v. *Hoey*, 11 Peters, 167.
Robertson v. *Coulter*, 16 How., 106.

(*c.*) No question as to validity of Act of Legislature of March 4, 1854, was raised in State court or decided by it.

Bridge Proprs. v. *Hoboken Co.*, 1 Wall., 116, 143.
Susquehanna Boom Co. v. *West Branch Boom Co.*, 110 U. S., 57.
Hoyt v. *Sheldon*, 1 Bl., 518.
Brown v. *Colorado*, 106 U. S., 95.
Detroit City Railway Company v. *Guthard*, 114 U. S., 133.

II.

IF THERE IS JURISDICTION, THE JUDGMENT OF THE STATE COURT SHOULD BE AFFIRMED.

1. The construction given by the State court to Section 2, of act of 1852, that title to lands purchased from the United States did not pass to the counties under that grant, is conclusive, and must be followed by this court.

Jefferson Branch Bank v. *Skelly*, 1 Black, 436, 443.
Bridge Proprs. v. *Hoboken Co.*, 1 Wall., 116, 144.
Commercial Bank v. *Buckingham's Executors*, 5 How., 317.
McBride v. *Hoey*, 11 Peters, 167.

2. Egan purchased this land from the United States

within the meaning of Section 2 of the act of 1852, and the county of Cook could not acquire and hold valid title against him.

(*a.*) By the certificate Egan became vested with title to this land; and could sell and convey, and protect his possession under it.

Simmons v. *Wagner*, 101 U. S., 260, 261.
Carroll v. *Safford*, 3 How., 441.
Smith v. *Ewing*, 23 Fed. Rep., 741;
Rev. Statutes of Ill., Ch. 51, § 20.

(*b.*) The subsequent cancellation by the Commissioner was *ex parte* and without legal effect. The Commissioner of the Land Office has no authority to cancel an entry arbitrarily and *ex parte*.

Carroll v. *Safford*, 3 How., 441.
Brill v. *Stiles*, 35 Ills., 305, 309.
Boyce v. *Danz*, 29 Mich., 146, 151.
Cornelius v. *Kessell*, 58 Wis., 237, 241.

On power of Commissioner to direct inquiry into good faith of entry.

Smith v. *Custer*, 8 Public L. Dicns., 266.
Travellers Ins. Co. 9, *id.* 316.

Order of February 1883, re-instating entry, confirmed rights under the original entry, under rules and practice of Land Department.

Tressie M. Pieper, 2 Copp's Pub. Land Laws, (1890) p. 1074.

ARGUMENT.

A large part of the argument, which has been submitted by counsel for the plaintiff in error, is given up to an unnecessary discussion of the force and effect of the plaintiff's evidence, which was conceded by the state court to have been sufficient to establish a *prima facie* right in the plaintiff to recover the land in controversy. The State court recognized clearly that the Act of Congress of September 28, 1850, was a grant *in præsenti*, and did not in any way question the admissibility or legal effect of the certificate of the surveyor general of the selections of this land by the state as swamp land, nor of the certificate of the state auditor. These questions, therefore, are not necessary to the argument on consideration of this case in this court.

The assignment of errors, which plaintiff has made, in this court, presents, so far as it attempts to state questions which might properly be the subject of consideration in this court, an entirely erroneous interpretation of the questions actually raised in and decided by the State court, and includes a number of questions, which could not properly be considered by this court and which were not in fact raised in or decided by the State court.

The important questions in this case, and to which we shall endeavor to confine our argument, are (1) as to the jurisdiction of this court to review the judgment of the State court; (2) as to whether the State court erred in holding that by the terms and conditions of the Act of the Legislature of June 22, 1852, as amended in 1854, title did not pass to the plaintiff to lands which had been

entered or purchased from the United States, and (3) whether Egan, from whom the defendant darreigns title, was a purchaser of the land in controversy, within the meaning and spirit of the Act of the Legislature of June 22, 1852.

I.

NO QUESTIONS WERE RAISED AND PRESENTED IN THE STATE COURT AND DECIDED BY THAT COURT WHICH WOULD, UNDER § 709 OF THE REVISED STATUTES, GIVE JURISDICTION TO THIS COURT TO REVIEW THE JUDGMENT OF THE STATE COURT ON THIS WRIT OF ERROR; AND THE WRIT OF ERROR SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

While it is not necessary for the purposes of the jurisdiction of this court that the questions stated in § 709 R. S. should appear on the record to have been raised and the decision made in direct and positive terms, *in ipsisimis verbis*, and "it is sufficient if it appears by clear "and necessary intendment that the question must have "been raised and must have been decided in order to "have induced the judgment;" yet it is not sufficient to show that a question might have arisen or been applicable, and it must affirmatively appear that the question did arise, and that the State court actually decided such question, or that its decision was necessary to the judgment.

Crowell v. *Randell*, 10 Peters, 392, 398.
Bolling v. *Lersner*, 91 U. S., 594.
Brown v. *Colorado*, 106 *id.*, 95.
Railroad Co. v. *Guthard*, 114 *id.*, 136.

From the statement, which we have made from this

record, of the questions which were in fact raised and presented in the state courts, both the Circuit and the Supreme court, and which were, in fact, decided in those courts, and from the opinion of the Supreme court (Trans., 37 to 40), it is evident that the decision and judgment of the State court was based entirely upon the construction, which it placed upon the terms and conditions of the act of the Legislature of Illinois, of June 22, 1852, under which the plaintiff in error claims title. The point upon which the decision and judgment turned, was the construction to be placed upon the second section of that act, and upon the words thereof, "it shall be "lawful for said counties to convey * * *." This provision, the State court held, "did not leave a "discretion resting with the county to hold the land or "convey * * * but a positive duty was imposed * * *." This decision of the State court cannot be considered as being anything more than a construction of the act of the Legislature, June 22, 1852. The validity of that statute or of the amendatory act of March 4, 1854, was in no way brought in question or involved in the decision; and, therefore, this court can have no jurisdiction to review the judgment of the State court.

Commercial Bank v. *Buckingham*, 5 How., 317.

None of the questions, upon which the plaintiff in error now seeks to found its claim of jurisdiction in this court to review the judgment of the State court, were in fact raised in that court or decided by it either directly or by implication; and perhaps the most concise method of showing this will be to take up in turn each of the alleged grounds of jurisdiction asserted by the plaintiff in its as-

signment of errors and on its behalf in the argument on this point submitted by its counsel.

1. The first error assigned (Trans., 47) is that the Supreme court erred in finding that the title to this land "was not good in Cook county under and by virtue of "the Act of Congress of September 28, 1850"; and in the argument on the question of jurisdiction, counsel assert that the decision of the State court drew in question the validity of the Act of Congress of September 28, 1850, as an absolute present grant of all swamp lands in Illinois, because the Supreme court "could not sustain "the validity of the Egan entry in 1853, without deciding "against the validity of the act of September 28, 1850, "as being an absolute present grant to the State of Illi- "nois." (Arg., 21.)

We understand counsel to assert by this proposi ion, that in sustaining, as they term it, "the validity of the "Egan entry in 1853," the Supreme court must necessarily have decided that the Swamp Land Act of September 28, 1850, did not operate as a grant *in præsenti* to vest title immediately in the State of Illinois. This proposition is wholly unfounded in fact. The State court expressly held that title passed to the State of Illinois by the Swamp Land Grant, and that the plaintiff established a *prima facie* right to recover; but decided in favor of the defendant solely by reason of the conditions and qualifications of the state's grant. It held that "the state, in "granting the lands to the counties, had the undoubted "power to provide that purchasers who had bought and "paid for the laws should be protected in their pur- "chases"; that the county of Cook derived its title under the act of 1852, as amended in 1854; that these acts did not pass title to the plaintiff, and it could not recover.

2. The second assignment of error is that the Supreme court of Illinois erred in not holding that the title to this land was confirmed in Cook county by the act of March 3, 1857 (Trans., 47); and in the argument the proposition asserted is (Arg., 22), that the State court "refused to give effect to the act of Congress of March "3, 1857, which confirmed all existing lists of swamp "lands, when the lands were 'vacant and unappropriated' "and not occupied."

This proposition is also without foundation. The decision of the Supreme court was that title to this land did not pass to the county of Cook by the act of the legislature of June 22, 1852, because of the conditions and qualifications of that act. Under that construction of the terms and conditions of the grant, under which plaintiff claims title, there was no title in plaintiff to this land to confirm. The Act of Congress of March 3, 1857, did not, therefore, enter in any way into the decision of this case by the Supreme court, and the opinion merely refers to this act as part of the legislation of Congress, which had been enacted in harmony with the prior legislation of the State of Illinois, with the intention of protecting the title of a purchaser of swamp lands.

When it is considered that the county of Cook can only claim title through the grant of the State of Illinois, and that neither the Swamp Land Act of 1850 nor the conformatory act of 1857 purported to vest in or confirm to the county any title to the swamp lands, and that the decision of the State court in this case was solely that under the conditions of the grant to the plaintiff from the state title to this land did not pass, the utter want of foundation for this assertion is evident.

This is not such a case as *Garland* v. *Wynn*, 20 How.,

6, or *Lytle* v. *Arkansas*, 22 How., 193, and similar cases, in which this court has held, that the rejection by the State court of, and decision against claim of title, asserted under the government, gave this court jurisdiction to review the decision of the State court.

3. The 3d, 4th, 5th, 7th and 8th assignments of error (Trans. 47) do not present questions, which would give this court jurisdiction, and need not be noticed here.

4. The 6th assignment of error (Trans. 47) is that "the Supreme court erred in sustaining the trial court in "the admission of improper testimony, to wit: The "Register and Receiver's certificate to the land in question, "dated October 20, 1853, the same being illegal, and "also because the same was canceled August 10, 1855.

As stated in the argument (Arg. 21), jurisdiction is claimed, because "the decision of the Supreme court of "Illinois drew in question an authority exercised under "the United States, to wit: The action of the Land "Department in canceling the Egan entry, and the "decision was against the validity of such cancellation," and, "that the decision could not have been rendered "without deciding against the validity of that cancellation.'

While it must be conceded, that the Supreme court of Illinois state at the conclusion of its opinion (Trans., 40) that "The Commissioner of the General Land Office had "no authority to vacate the entry, and any order that he "may have made did not affect the rights of Egan," yet this does not furnish ground for jurisdiction in this court to review the judgment of the State court. This will be apparent from a consideration of the record before the Supreme court of Illinois and of the questions in fact decided by it.

In the first place, no "title, right, privilege or immu-"nity is claimed" by the plaintiff in this case under the action of the Commissioner of the Land Office in cancelling the Egan entry, admitting here for the purposes of the argument that the entry was canceled. The provision of § 709, R. S., by reason of which it is here claimed that this ruling of the State court gives jurisdiction to this court to review its judgment, is that the decision of the State court must be against a "title, right, "privilege or immunity, specially set up or claimed by "either party under * * * authority" exercised under the United States. The plaintiff's claim of title in this case was solely under the act of the legislature of Illinois and no claim of title was, or for that matter could have been, specially set up or claimed in the state court by it under any action of the Land Department.

In the second place, the plaintiff in error did not raise or present this question in the State court; and it does not appear "by 'necessary intendment' that the "question must have been raised and must have been "decided in order to have induced the judg-"ment." The record shows that the only reference to this cancellation, that was made by plaintiff in the state court, was by way of objection to the admission in evidence of the Register and Receiver's certificate (see Trans., 10), and by a proposition of law as to the effect of this cancellation as a matter of evidence, which it submitted, and which the trial court refused. The defendant introduced in evidence a certified copy of the certificate, to which the plaintiff objected, among other reasons on the ground "that said certificate showed upon its face "that it was canceled." The proposition of law referring to this cancellation, which the plaintiff submitted, was

that "in the absence of any facts or evidence showing "the circumstances which led to its cancellation, it must "be presumed to have been based upon sufficient facts to "authorize it." (See 15th proposition, Trans. 25.) It cannot be successfully contended that by this objection to the admission of the certificate in evidence, or by this proposition of law submitted as to the effect to be given to this cancellation by way of presumption and as a matter of evidence, the question as to the *validity* of this action of the Commissioner, was raised and presented by the plaintiff in the trial court; and as the only errors assigned in the Supreme court were as to the Circuit court's rulings on the propositions of law submitted to it, it is clear that no such question was raised in the Supreme court. Had the plaintiff desired to raise such question, it should have requested the trial court to hold directly that by this cancellation the Egan entry became void; but it neither did this nor anything at all equivalent to it.

Nor would a decision sustaining the validity of the Egan entry and purchase from the government require as a necessity the State court to decide against the *validity* of this action of the Land Department. The endorsements upon the certificate, made in the General Land Office, showed, as we shall contend, that it was not the intention of the Land Department to cancel this entry, but that the original warrant was suspended, and the substitution of another warrant was at that time allowed to Egan, although the final order of substitution was not made by the commissioner until 1883. Had that question been raised, in fact, it would not have been necessary for the State court to consider and determine it, in order to sustain its judgment for the defendant. The question was not

raised, however, and it cannot now be urged in this court as a ground for jurisdiction.

We do not understand that the statement in the opinion of the State court, that the commissioner of the General Land Office had no authority to vacate the entry, and that any order he may have made could not affect Egan's rights, can be held to be a decision against a title claimed under an authority exercised under the United States, when in fact no claim of title was made under any act or order of the commissioner as to this entry, and when no question as to the validity of his action was raised in the State court.

In the third place the only question before the State court with reference to Egan's entry and purchase of the land was as to whether or not he was a purchaser from the government within the spirit and meaning of section 2 of the act of the legislature of June 22, 1852. This question was one solely of construction of the state statute, and in affirming the judgment for the defendant the Supreme court necessarily held and decided that Egan was a purchaser within the meaning of that act. This question, strictly one of the construction and not the validity of a state statute, is not a federal question, and furnishes no basis of jurisdiction to this court to review the judgment of the State court.

Commercial Bank v. *Buckingham*, 5 How., 317.
McBride v. *Hoey*, 11 Peters, 167.
Robertson v. *Coulter*, 16 How., 106.

5. In addition to the several errors assigned on the transcript of the record, which appear on page 47, the plaintiff has stated as a ninth error in the ruling of the

Supreme court (see brief p. 6), that it erred in holding that by the act of June 22, 1852, this land was not conveyed absolutely; and that "the action of said court in "holding that said act of March 4, 1854, transferred "said title of Cook county in said land to William B. "Egan and his assigns, impaired the obligation of the "contract in the act of 1852, whereby said land was "conveyed to plaintiff."

And in the argument of this question, counsel assert, (Arg, 21, 22,) that the act of June 22, 1852, was a grant *in præsenti* to the counties of all swamp lands within their limits; and that the decision of the Supreme court "sustaining the validity of a law amendatory "thereof, which divested the plaintiff of its title and gave "it to the entryman," passed March 4, 1854, is subject to review in this court. The contention is that the Act of the Legislature of March 4, 1854, was in violation of and impaired the obligation of the grant to the plaintiff of the prior act of June 21, 1852; and that this court has jurisdiction to review the judgment of the Supreme court, because it sustained the validity of that act. Counsel cite in support of the proposition the case of *Jefferson Branch Bank* v. *Skelly*, 1 Black., 436; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116, and *Hoadley* v. *San Francisco*, 124 U. S., 639.

There are several reasons why this proposition is without foundation and inapplicable in this case. In the first place, it is not founded in fact; the Supreme court did not hold, as asserted in the assignment of error and in the statement of the claim of jurisdiction, that the act of June 22, 1852, was not a grant *in præsenti*, and that the subsequent act of March 4, 1854, transferred the title of Cook county in this land to Egan and his assigns. On

the contrary, the Supreme court held that under the conditions of the second section of the act of June 22, 1852, the beneficial title to this land did not pass to Cook county. The State court did not hold, as counsel assert, that title vested in the county by the grant of June 22, 1852, and was divested by the subsequent act of March 4, 1854; but held that the conditions of the grant were such that no title passed to the county.

It is true that the opinion of the Supreme court states the substance of the act of March 4, 1854, in connection with the second section of the act of June 22, 1852, and says: "The county of Cook derived its title to the land "under and by virtue of the act of 1852, as amended in "1854, and if the acts do not pass the title to the land in "question, it is plain that Cook county could not recover." Yet, however, the controlling point in the decision is the construction, which the court puts on the provision of the second section of the act of 1852: "It shall be lawful for "the said counties to convey." It was this provision, that the court holds, imposed a positive duty to transfer such title as the county acquired to the purchaser from the United States.

Again, it is important in this connection to note, that so far as concerned the conditions of the grant, imposing as the Supreme court says: "a positive duty" to transfer its title to the purchaser from the United States, the act of March 4, 1854, does not in any way enlarge or change the provisions of the act of 1852. It simply amends and changes the manner in which this transfer of title shall be made; and provides for enforcing the conditions of the grant, but it does not in any way purport to add any conditions or qualifications to the grant of the prior act.

This will be apparent from a comparison of the second

section of the act of 1852, with the first section of the act of 1854. The former creates a duty on the part of the county to convey to purchasers from the United States since the passage of the act; while the latter provides for the manner in which conveyance shall be made, and directs the County courts to make the necessary orders therefor. It was, because of the condition attached to the grant of 1852, in favor of purchasers from the United States, and the duty imposed by that grant upon the plaintiff to transfer the title acquired by it to such purchasers, that the Supreme court held that title to this land did not pass to the plaintiff, and not because of any conditions attached to the grant by the act of March 4, 1854.

In the second place, the fact that no such question was raised, or in any manner suggested in the State court, presents an insurmountable objection to its being raised or considered in this court. In none of the propositions of law, which were submitted by the plaintiff to the trial court for its ruling, can there be found the slightest suggestion that the amendatory act of 1854 should be held to impair the obligation of the grant of the act of 1852 to the plaintiff, and to be, therefore, in violation of the federal constitution. Nor was any such question raised in the Supreme court or in any manner presented to it for its decision. So far as this record shows, the validity of the act of 1854 was never questioned by the plaintiff, until its counsel made this question in their argument in this court. The rule is thus stated by this court in *Bridge Proprietors* v. *Hoboken Company*, 1 Wall., 116, 143. "The court must be able to see clearly from the whole "record, that a certain provision of the constitution or act "of Congress was relied on by the party who brings the

"writ of error, and that the right thus claimed by him "was denied."

And in *Susquehanna Boom Company* v. *West Branch Boom Company*, 110 U. S., 57, where the plaintiff in error asserted the claim in this court that the charter given by the state to the defendant in error would impair the obligation of the state's contract with it, it was held that this court had no jurisdiction, as there was nothing in the record prior to the judgment in the State court that showed any such claim on the plaintiff's part.

Hoyt v. *Sheldon*, 1 Black, 518.
Brown v. *Colorado*, 106 U. S., 95.
Detroit City Railway Company v. *Gothard*, 114 U. S., 133.

In *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, and *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall, 116, cited by counsel, the sole claim upon which relief was sought in the State court, and the sole question raised, was, that the statute in question in these cases was invalid and unconstitutional, because it impaired the obligation of a contract. And in *Hoadley* v. *San Francisco*, 124 U. S., 639, the remaining case cited, the question was raised in the State court.

In the case at bar, however, the question as to the validity of the act of March 4, 1854, was never raised in any manner in the State court, and has never been passed upon by that court, and under the oft-repeated rule of this court, it cannot be raised now; and jurisdiction in this court to review the judgment of the State court cannot be founded on the present suggestion of this question.

Before concluding this review of the several grounds

upon which the plaintiff in error claims that this court has jurisdiction to review this judgment, we will call attention to an extraordinary claim of jurisdiction, which counsel have asserted at the close of their argument. They say (Arg., 96): "The judgment of the State "court sustained the title under the Bunn entry, so there "'is drawn in question the validity of * * * an au- "thority exercised under the United States,' to wit: The "selection of this land as swamp land by the United "States Surveyor General therefore; 'and the decision is "against (its) validity,' and gives this court jurisdiction "to do justice between the parties litigant."

The fact that the Supreme court did not make any decision whatever as to the Bunn entry is sufficient asswer to this proposition. The Circuit court made no findings as to the Bunn entry, but found that Egan acquired title through his purchase from the government, and that he came within the protection of the second section of the act of 1852, and based its judgment on that finding; and the only questions before the Supreme court were those presented by the findings of the Circuit court. This claim of jurisdiction, therefore, if wholly unfounded.

It is true that Bowen, to whom patent issued under the Bunn entry, after getting his patent, bought the Egan title; but this was only a practical recognition of the validity of that title, and does not in any way make the Bunn entry a question in this case.

Counsel have cited, on page 23 of their argument, a number of decisions of this court, which they claim to be like the present case, and in which this court has taken jurisdiction. Without commenting on these cases specifically, it is sufficient to say, that in each of them, so far as the matter in controversy was title to the land, plaint-

iff's claim to title, which the State court rejected, was from the United States, and a federal question was clearly presented. But in this case, the plaintiff's claim of title is by grant from the State of Illinois, and the judgment of the State court against its claim is based on the conditions of that grant, so that no analogy exists between this case and the cases cited.

We have endeavored to state fully every ground which the plaintiff has advanced to support the jurisdiction of this court to review the judgment of the State court in this case; and we submit that not one of them is well founded. We claim that the judgment of the State court is based wholly upon its construction of the terms and conditions of the Act of the Legislature of June 22, 1852; that the only question before it was as to the construction of that act; and that no question was raised in that court or decided by it, that would give this court jurisdiction; and therefore the writ of error should be dismissed.

I.

IF THIS COURT SHALL, HOWEVER, FIND THAT IT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE STATE COURT IN THIS CASE, IT SHOULD AFFIRM THAT JUDGGMENT.

1. *The construction, which the State court placed upon Section 2 of the act of June 22, 1852, under which plaintiff claims title, that it imposed a positive duty on the plaintiff to convey the title acquired by it under that act to purchasers from the United States, and "that where lands had been "bought in good faith from the United States the title to "such lands did not become vested in the county, but*

"passed to the purchaser under his entry," is conclusive, and should be followed by this court. This construction gives effect to the manifest intent and purpose of the State of Illinois, and must not only be considered by this court as conclusive, but as a just and equitable interpretation of that act.

There can be no question but that this was the construction which the State court placed upon the act of June 22, 1852. The trial court had found, that the receipt and retention by the United States of the money and warrant delivered by Egan on October 20, 1853, in payment for this land was a sale by the United States to Egan (see second proposition held for defendant, Trans., 26) and that under the act of the legislature of June 22, 1852, and under the act amendatory thereof, of March 4, 1854, "the "county of Cook could not become the owner of this land "as against Egan until it should comply with the require- "ments of said acts as to purchasers of swamp lands from "the United States," (see fourth proposition, Trans., 27), and on these findings rendered judgment for the defendant; and the opinion of the Supreme court expressly places the same construction on these statutes.

It is contended by the plaintiff that the judgment of the State court is based upon the Act of the Legislature of March 4, 1854, coupled with the Acts of Congress of 1855 and 1857, which are referred to; and counsel assert that the Act of the Legislature, March 4, 1854 transferred the title of Cook county in this land to, Egan, and thereby impaired the obligation of the contract contained in the first section of the act of 1852. (See argument, 74, *et seq.*) This view of the opinion and judgment of the State court, we think, is clearly erroneous; and we have already considered it, in part, in discussing the question of jurisdiction.

The Supreme court says that the first section of the act of 1852 is general in its terms, but section 2 qualifies it, "and declares that whenever it shall appear that any "of the lands granted to the state shall have been sold, "it shall be lawful for said counties to convey such lands "to the purchasers thereof"; that the amendatory act of March 4, 1854, required the County courts to make all necessary orders for securing to purchasers of swamp lands their titles to such lands; that "under this legisla- "tion it is manifest that the State of Illinois never in- "tended to transfer to the counties, lands that had been "entered from the United States, but, on the other hand, "the object was to protect the title of all purchasers;" and that "the language, 'it shall be lawful for said "counties to convey,' (which is the express provision of "section 2 of the act of June 22, 1852,) did not leave a "discretion * * * but a positive duty was imposed "to transfer such title as it acquired, to the purchaser "from the United States. * * *" The duty to transfer its title to the purchaser was imposed by the state in section 2, of the act of 1852 as a condition to its grant, and was not created by the subsequent amendatory act of March 4. 1854, which in no sense enlarged the conditions of the grant, but simply amended the provisions for carrying these conditions into effect. We submit, therefore, that the State court in its judgment and opinion, construed the Act of the Legislature of 1852 as not passing title to the counties to swamp and overflowed lands that were purchased in good faith from the United States; and that this construction of the state statute must be conclusive in this court.

The rule of interpretation of thiscou rt is said, in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443, to have

invariably been, "that the constructions given by the "courts of the state to state legislation and to state consti- "tutions have been conclusive upon this court *with a single* "*exception*, and that is when it has been called upon to in- "terpret the contracts of states. * * * It has never "been denied, nor is it now, that the Supreme court of "the United States has an appellate power to revise the "judgments of the Supreme court of a state, whenever "such court shall adjudge that not to be a contract, which "has been alleged in the form of legal proceedings, by "a litigant to be one, within the meaning of the clause "of the constitution of the United States, which inhibits "the states from passing any law impairing the obliga- "tions of contracts." The exception stated in this rule does not apply to the interpretation and construction given by the State court to the contract itself, where the plaintiff simply asserts and seeks to enforce a right claimed under the contract (which was the case here), and where no claim is asserted that by subsequent statute the state has impaired the obligation of the contract. It only applies when the State court has sustained the validity of a statute, which is alleged and claimed by form of legal proceedings to have impaired the obligation of some prior contract.

Bridge Proprietors v. *Hoboken Co.*, 1 Wall 116, 144.

Commercial Bank v. *Buckingham's Executors*, 5 How., 317.

McBride v. *Hoey*, 11 Peters, 167.

As no claim was asserted by the plaintiff in the State court against the validity of the Amendatory Act of the Legislature of March 4, 1854, it is unnecessary to consider how far, if at all, the State court based its judgment upon

the provisions of that act. In its opinion it refers to and couples that act with the prior act of 1852, as manifesting the intention of the Legislature by this legislation to protect the titles of purchasers of swamp lands from the government; but it is apparent that the State court holds that the Legislature so qualified its grant by the second section, that the plaintiff could not get and hold title to lands, which were purchased from the United States, and that this construction of the grant must be conclusive in this court.

It is further contended by the plaintiff, that the conditions of the second section of the act of June 22, 1852, did not apply to Cook county, and that the grant of swamp and overflowed lands to it was absolute and unconditional. The argument in support of this contention is, that the plaintiff was under township organization in 1852, when that act passed, and that no authority was given to it to convey such lands to purchasers from the United States, until 1854. This point was not raised in the State court, and it cannot be raised here. There is no foundation for it in the record or in the Act of the Legislature. And if it be true in fact, that at the time of the passage of the act of 1852, the provisions of its second section as to the form and manner in which conveyance should be made by the counties to purchasers from the United States were not then applicable to the county of Cook, owing to the form of its organization, the positive duty to convey was imposed as a condition to the grant, and the means and form in which such conveyance should be made, could be provided for later. The State court construed this second section of this act as creating a positive duty to convey and as manifesting the intention of the state not to transfer to the plaintiff lands that had been entered from

the United States, but to protect the title of all purchasers; and counsel argue in vain that this construction was unwarranted and absurd.

It is further argued by counsel that the conditions of the act of June 22, 1852, did not apply to the Egan entry, because, when that act was passed, Egan had not entered this land. They assert (p. 81) that the act of 1852 might very properly be applied to such sales as occurred between September 28, 1850, and June 22, 1852, "but "any condition beyond that in this statute would be *un-* "*constitutional.*" On what theory a condition, imposed on this grant in favor of subsequent purchasers, would be unconstitutional, they do not explain. As a matter of fact, the condition of section 2 applies expressly to all purchases made from the United States "since the passage "of this act," and is in no way limited simply to purchases made between September 28, 1850, and June 22, 1852. Had the Legislature of Illinois any such intention or purpose, it would have expressly limited the provisions of section 2 to all purchases made *prior to June 22, 1852.* It was the evident purpose and intention of the state to protect the title of purchasers from the government, who should purchase swamp or overflowed lands before their selection by the state and the issue of patents to the state, and to exclude all such lands purchased from its grant to the counties.

It is well in this connection to consider the nature of the legislation, both of the State of Illinois and of Congress, in reference to these swamp and overflowed lands and the purpose and intention of the State of Illinois and of Congress, manifest in its legislation to protect the titles of all purchasers from the United States.

When the Legislature of Illinois passed the act of June

22, 1852, no steps had been taken to select and determine what lands were swamp and overflowed, and had been granted to it by the Act of Congress of September 28, 1850, although in the meantime the sales of public lands by the United States had gone on without reference to the nature and character of the lands sold or to the prior grant to the state. The Commissioner of the General Land Office had, in 1850, shortly after the passage of the Swamp Land Act, held and declared that that act operated as a grant *in præsenti* to the states; so that there was a grave necessity for giving protection to purchasers from the United States who should enter lands, which might afterwards be selected by the state as swamp or overflowed lands. It was to afford this protection that the State of Illinois made it a condition of its grant to the counties that they should convey to all purchasers from the government such title as they acquired to these lands, and provided that in all such cases the counties should be entitled to receive the consideration paid for the lands to the United States. The provisions of this act protected both the purchaser from the government and the county by giving to the purchaser the state's title to the land and to the county the right to receive the money paid for the land.

It is worthy of notice that the State of Illinois passed this act almost three years before Congress, with the same end in view of protecting and affording relief to purchasers of swamp and overflowed lands, passed the act of March 2, 1855. The state, therefore, by its legislation, voluntarily relinquished in favor of the purchaser from the United States the title to swamp and overflowed lands granted to it by Congress by the act of September 28, 1850; and the subsequent act passed by Congress in

1855 for the relief of purchasers of swamp lands from the government is simply in line and harmony with the prior act of the State of Illinois.

The Act of the Legislature of March 4, 1854, adds nothing to the conditions of the grant made by the state to the counties, but simply provides in effect the manner in which these conditions shall be carried out. And the Act of Congress of March 3, 1857, confirming to the several states the swamp and overflowed lands selected under the act of September 28, 1850, had in view simply the confirmation of selections made by the states, and expressly provided that nothing contained therein should interfere with the provisions of the Act of Congress of March 2, 1855, for the relief of purchasers and locators of swamps and overflowed lands. Therefore, on the one hand the purpose and intention of the Legislature of the State of Illinois to protect the title of purchasers from the government of swamp and overflowed lands, and to exclude all such lands so purchased from its grant to the counties is stated in this act of June, 1852, and the same purpose so far as the protection of purchasers from the government is concerned is manifested by Congress in its act of 1854. The Act of Congress adds no force to the prior Act of the Legislature of Illinois, except as it indicates the same general purpose and intention on the part of the United States.

The State of Illinois, as grantee from the United States, could voluntarily accept any conditions which the United States might subsequently attach to its grant; but in this case, in place of accepting conditions which the grantor sought to attach to the prior grant, the State of Illinois voluntarily relinquished, before any action of its grantor, so much of the swamp and overflowed lands,

granted to it by the Act of Congress of September 28, 1850, as should be purchased from the United States; and with its action in this regard, its grantee, the County of Cook, can have no possible concern. We submit the construction given by the State courts to the conditions of the grant of June 22, 1852, is not only conclusive upon this court as being the construction by the State court of the state statute, but must be held to be a just and equitable interpretation of that statute, giving full effect to the purpose and intention of the state manifested therein.

2. Egan purchased this land from the United States prior to its selection as swamp or overflowed land, enuring to the State of Illinois under the Act of Congress of September 28, 1850, within the meaning of section 2 of the act of 1852; and the county of Cook could not under that grant hold or acquire title against him.

There can be no question but that the State court held, that Egan purchased this land from the United States within the meaning of the second section of the act of 1852, and that the plaintiff could not under that grant acquire or hold title against him or his assigns. The judgment of the Supreme court of Illinois for the defendant in the light of its opinion involves of necessity this holding. We contend that the construction given to section 2 of the act of 1852 by the State court and its decision that Egan was a purchaser from the United States within the meaning of that section of the statute, must be conclusive in this court.

The record shows as to Egan's purchase and entry of this land, that on October 20, 1853, he entered this land with land warrant No. 2,495, and received the Register's

and Receiver's certificate of its location and entry, having paid, as appears from the memorandum of the register, endorsed on the certificate on file in the General Land Office, the cash part of his payment February 28, 1853.

It cannot, therefore, be disputed, we contend, that Egan purchased this land from the United States and paid for it, and that the United States received from him in payment this land warrant No. 2,495, and the amount of money necessary, and issued to him the certificate of the entry of this land.

By this final certificate of entry and payment, Egan's purchase from the government was complete. He could convey this land, as if patent had issued; and the certificate itself was equivalent, as far as the government was concerned, to a patent actually issued.

"It is well settled that when lands have once been sold "by the United States and the purchase money paid, the "lands sold are segregated from the public domain, and "are no longer subject to entry. A subsequent sale and "grant of the same lands to another person would be "absolutely null and void, so long as the first sale con- "tinued in force. *Wirth* v. *Bronson*, 98 U. S., 118; "*Frisbie* v. *Whitney*, 9 Wall., 187; *Lytle* v. *State of* "*Arkansas*, 9 How., 314. *Where the right to a patent* "*has once become vested in a purchaser of public lands, it* "*is equivalent, so far as the government is concerned, to a* "*patent actually issued. The execution and delivery of the* "*patent after the rights to it have become complete, are the* "*mere ministerial acts of the officers charged with that* "*duty.*"

Simmons v. *Wagner*, 101 U. S., 260, 261.
Carroll v. *Safford*, 3 How., 441, 460.
Smith v. *Ewing*, 23 Fed. Rep., 741, 745.

And the statutes of Illinois provide expressly (*Starr* v. *Curtis*, R. S. Ch., 51, § 20), that "the certificate of "any such register of the entry or purchase of any tract "of land within his district, shall be deemed and taken "to be evidence of title in the party who made such en- "try or purchase, or his heirs or assigns, and shall enable "such party, his heirs or assigns, to recover or protect "the possession of the land described in such certificate "in any action of ejectment * * * ."

And this clearly made him a purchaser of this land within the meaning of section 2 of the act of June 22, 1852. His purchase was made before this land was listed in the General Land Office as selected by the State of Illinois, and before the certificate of the Surveyor General was made certifying that this land was swampy and subject to overflow within the meaning of the Act of Congress of September 28, 1850, and that it enured to the State of Illinois under that act. Egan was, therefore, entitled to the protection of the second section of the act of June, 1852, and the county could not under that grant acquire and hold title as against him; and the defendant, claiming title by *mesne* conveyances from Egan, could protect its possession in this action under that certificate.

Counsel contend, without reference to the provisions of section 2, of the act of 1852, that the inception of the plaintiff's title was September 28, 1850, the date of the grant by the government to the state, and that as Egan's title vested in October, 1853, the plaintiff had the better title. They assume that the United States granted this land to the plaintiff, and ignore the fact that the plaintiff's claim of title is solely under the grant of the state. But the question is simply, whether by reason of the conditions

of the state's grant in favor of purchasers from the United States the county could acquire and hold any title to this land as against Egan and his assigns; and this question depends upon whether Egan was a purchaser within the meaning of that act. The state court held that he was, and we submit that the certificate of his entry of the land and payment for it, and the receipt and the retention by the United States of his money and land warrant shows conclusively his purchase, and brings him within the protection of the second section of the act of 1852.

Certain endorsements and memoranda, made in the General Land Office, are shown by the certified copy of the certificate of Egan's entry of this land on deposit in the General Land Office, which tend to show, that in 1855, two years after Egan's entry and payment for this land, and after the certificate thereof issued to him, the word "canceled" was written across the face of the duplicate certificate on file in the General Land Office, and that subsequently in 1883, the endorsement: "Rein- "stated February 15, 1883, warrant 101,403, act of 1850, "40a, substituted," was also written across the face of this duplicate certificate. The precise form of these endorsements and the accompanying memoranda, shown by the certified copy of this duplicate certificate, is reproduced very clearly on pages 87 to 89 of the argument for the plaintiff in error. This copy will be found more satisfactory than the copy in the transcript of the record.

In addition to the above endorsements on the face of the duplicate certificate are the following endorsements and memoranda, stated in their chronological order, but not in the order in which they appear on the certified copy:

"40 acres, 2,495. 40

"Chicago, Ill,"

(Evidently made when certificate issued.)

"This entry is in conformity with Com. letter Septem-
"ber 13, 1853. The cash part was paid February 28,
"1853.

"JAMES LONG,

"*Register.*"

(Evidently made at date of entry.)

"Wt. susp., however, for erasure, party desires its lo-
"cation canceled, see Reg. (Chicago) letter of May 28,
"1855, canceled therefor and party allowed to relocate
"with another Wt. No. 101,043."

"August 10, 1855."

"Canceled see letter to Reg'r, Springfield, Ills., Aug't
"10, 1855. Binckly."

"Cancellation noted on tract book.

"17 Nov'r, 1855.

"R. W. B.

"B. K."

"Wt. 101,043. Act. 18. 40 acres.

"Substituted for the above number

Feb'y 15, 1883."

"Re-instatement noted Feb'y 15, 1883.

"See cash entry, No. 29,521, Springfield.

LAWRENCE."

"This location is re-instated and warrant No. 101,043
"for 40 acres, Act Sept. 28, 1850, substituted for Wt.
"No. 2,495, for 40 acres, Act of 1852, in Div. K., Febru-
"ary 15, 1883.

"E. KILPATRICK,

"Div. 'K'."

There is nothing in these endorsements and memoranda that would take away Egan's status as a purchaser of this land from the United States, or that would deprive him of the protection given by section 2 of the act of 1852. The transaction stated in the memorandum, dated August 10, 1855, was a substitution by Egan with the consent of the officers of the Land Department of warrant No. 101,043 for the original warrant No. 2,495, which for some erasure was suspended. It is evident that this substitution was made then and the other warrant, No. 101,043, was at that time delivered by Egan to the register and receiver and accepted by them. Egan's purchase of this land remained unaffected; the United States retained the money paid by him and received from him an additional warrant; and there was no intention on his part or on the part of the register and receiver of cancelling his entry of this land and rescinding his purchase.

The Commissioner of the General Land Office, under the same date, August 10, 1855, caused the endorsement of cancellation to be made across the face of the duplicate certificate on file in his office. We think that it is clear from the nature of the memorandum, made by the register and receiver of that date, of the allowance to Egan to substitute another warrant for the suspended warrant, that the commissioner intended by his endorsement nothing more than to cancel the location ~~under~~ the suspended warrant, and thereby make the suspension of warrant No. 2,495 absolute. We do not think that it was his intention to attempt to cancel Egan's purchase and entry of this land, because such action would have been utterly inconsistent with the agreement as to substitution made by the register and receiver; and because, in such

case, there would have been some order made by the commissioner which would be shown by this certified copy of the certificate on file in his office, as to the payment by the government of the money received by it from Egan and the return of the substituted warrant No. 101,043.

The material points to be considered in this connection, therefore, are, (1) that in 1855, the original warrant under which this land was located was suspended for some erasure, and that the register and receiver who had issued the certificate of entry to Eagan and had received from him the payment for the land, allowed him to substitute another warrant in place of the suspended warrant, and received from him for that purpose warrant No. 101,043. (The fact that Egan delivered to the register and receiver warrant No. 101,043 in 1855, cannot be controverted, because had he not made the delivery at that time and had they not received and accepted it from him, they could not have endorsed their memorandum that he was allowed at that time to substitute warrant No. 101,043 in place of the suspended warrant. Their memorandum is specific, and can only refer to a warrant which they then had in hand, received from Egan.)

In the second place, it is evident that the United States retained the money paid by Egan, and received from him and retained, not only the original warrant 2,495, but the substituted warrant 101,043.

In the third place, the commissioner's endorsement of cancellation upon the face of the certificate is not accompanied by any provision or order as to repayment to Egan of the money paid by him or the return of the substituted warrant which the government had received from him; and, finally, in 1883, the commissioner of the land

office, on his attention being called to the record in his office, makes the final order of substitution of Land Warrant 101,043, for the suspended warrant, and re-instating the certificate, which, instead of the order of cancellation, should have been made in 1855 on the memorandum of the register,.

For these reasons we contend that it was never intended to cancel the entry of the land, but merely to cancel the location of the suspended warrant; that the United States allowed another warrant to be substituted in place of the suspended one, and received and retained the substituted warrant; and that the commissioner's indorsement of cancellation on the certificate of entry was clearly a mistake, and that he should have entered a final order of substitution, as was done in 1883.

Counsel for plaintiff claim (Arg., 93) that the register's memorandum shows that Egan requested the cancellation to be made, and got leave "to take further "action if he saw fit, but no further action appeared "to have been taken, so far as this entry "was concerned, and consequently it stood can-"celed." Their error in the interpretation of the register's memorandum, and of Egan's action, as shown thereby, is obvious. The cancellation of the entry was not under consideration between him and the register, but simply the suspension of the warrant. Egan was at that time allowed to relocate with another warant; and the substitution of warrant 101,043 for No. 2,495 was made then. There was no further action for him to take as to this entry; he had paid his money years before; he had originally delivered warrant 2,495; and in 1855, on its suspension, he obtained leave to substitute for it warrant No. 101,043, and after that, as far as he was

concerned, there was nothing further to be done. The error in the matter was in the failure of the Land Office to complete the transaction and enter the formal order of substitution, and in the erroneous order of cancellation made by the commissioner. This error was corrected in 1883, and the order then made, formally substituting warrant 101,043 for warrant 2,495, and re-instating the entry, relates back to the date of the entry, and operates to confirm title under it in Egan and his assigns.

If the action of the Commisioner, in causing the endorsement of cancellation to be made upon the face of the duplicate certificate on file in his office should be interpreted as an attempt by him to cancel Egan's entry and purchase of this land, we submit that he had no power or authority to take such action. There was no investigation or hearing of any kind as to the validity and *bona fides* of this entry and purchase, and no notice given to Egan or his assigns of any such hearing or trial. On the contrary, the memorandum of the Register shows expressly, that Egan had received permission to substitute another warrant in place of the suspended warrant, and had delivered to the Register the substituted warrant; so that he had done all that was necessary for him to do, and could have no reason to anticipate any adverse action by the Land Department.

It is not necessary to raise the question as to whether the commissioner had power to cancel this entry. Counsel for plaintiff have, in their argument (pages 92, 93), expressly stated, that *they do not claim that he could arbitrarily, or as a judicial act, cancel a valid entry of land.* As it cannot be, and is not, questioned that Egan's entry of this land was *valid*, in the sense in which counsel use this term, they must be considered to mean that they do not

claim that the commissioner could "arbitrarily or as a "judicial act" cancel Egan's entry; and it is also clear, that the cancellation of this entry by the commissioner was, in this case, an "arbitrary" act. Therefore, so far as concerns the power of the commissioner to make this order of cancellation, if his order can properly be considered as an attempted cancellation of the entry, counsel admit that he had no such power.

But as counsel, on page 65 of their argument, assert that the commissioner had full authority to make this cancellation under section 2,450 of the Revised Statutes, we cannot, perhaps, rely entirely on their subsequent admissions. The section of the Revised Statutes referred to must be construed with the following section 2,451, and clearly does not vest in the commissioner any authority to act *ex parte* on his own motion, and arbitrarily cancel a certificate of entry that had issued several years before. It contemplates a judicial hearing before the commissioner, on due notice, in case of "suspended entries"; and requires that his adjudication shall be "approved by the secretary "of the interior and the attorney-general, acting as a board;" and it is clear that without an adjudication, or a judicial hearing, and without the subsequent approval of this board, any order or action of the commissioner *ex parte* is a nullity.

Carrall v. *Safford*, 3 How., 460.
Smith v. *Ewing*, 23 Fed. Rep., 741, 745.
Brill v. *Stiles*, 35 Ill., 305, 309.
Boyce v. *Danz*, 29 Mich., 146, 151.
Cornelius v. *Kessel*, 58 Wis., 237, 241, 242.

We do not question the authority of the commissioner to correct clerical mistakes in the action of the register, as in *Bell* v. *Hearne*, 19 How., 252; nor his authority,

when charges of fraud in the entry of lands have been made, to order and direct an investigation and trial of these charges on due notice before the register and receiver, and in case upon such trial the charges of fraud should be found sustained, to supervise and review the action of the register and receiver, and to affirm or reverse their finding and enter such orders as shall be necessary to give effect to his finding, subject to review by the Secretary of the Interior on appeal. This authority is fully discussed by Secretary Vilas in *Smith* v. *Custer*, Vol., 8, Decisions of the Dept. of the Interior relating to Public Lands, 269, and also in Traveller Ins. Co. case, Vol. 9, *id.*, 316. It is the "good faith of the entry that gives "it validity," and bad faith vitiates it; and there is undoubted authority for the officers of the land department to examine into and try charges of bad faith.

Hill v. *Miller*, 36 Mo., 182.

In the present case there were no charges of bad faith; there was no judicial inquiry or trial; and the action of the commissioner was purely *ex parte*. Indeed, we claim that he never intended, in fact, to cancel the entry, but simply to note the absolute suspension of the original warrant, No. 2,495; and by error omitted to enter the final order of substitution, which was afterwards supplied. However that may be, treating the action of the commissioner as an attempt to cancel the entry itself and rescind Egan's purchase, we submit that it was without legal authority and a nullity, and could have no effect on the rights of Egan or his assigns.

As the question was raised in the State court, it was a question simply of the effect of this action of the commissioner in 1855, as a matter of evidence, and by way

of presumption. It is only necessary to say as to this, that in order that any effect or presumption should be given to it, it should be made to appear, that the commissioner had legal authority to take this action; and as the certified copy of the matters on file in the land office in connection with this certificate wholly failed to show any such legal authority, the action of the commissioner must be treated as an absolute nullity. (We note in this connection, that counsel in their argument, page 86, differ very materially from the record in stating the objections which were interposed by the plaintiff in the Circuit court to the introduction of this certificate; and the ground stated in the argument in italics, "that the register and "receiver had power to cancel the certificate, with the "consent of the holder of such certificate so requesting "such cancellation," together with the remainder of the paragraph, does not appear on the transcript of the record where the objection as made is stated. See Trans. 10.)

The effect of the order of February, 1883, allowing substitution of the warrant No. 101,043 for warrant No. 2,495, and reinstating the entry, requires but brief consideration. We have already stated our claim, that this order was made in pursuance to the memorandum of the transaction, made by the register in 1855; that it should have been entered at that time, and was entered in 1883 to correct the error of the department in neglecting its entry at the proper time. When made, it operated to correct the former error, and should be treated as if the Land Office had entered it in 1855, when Egan was allowed to make this substitution of warrant No. 101,043 for warrant No. 2,495. This, we understand, would be in harmony with the rules and practice of the Land Office, and we refer to Rule No. 41 of Circular of July 20, 1875, that "when

"a valid entry is withheld from patent on account of the "objectionable character of the warrant located thereon, "the parties in interest may procure the issue of a patent "by filing * * * an acceptable substitute for said "warrant. *The substitution must be made in the name of "the original locator.* * * * "

Tressie M. Piper, 2 Copp's Pub. L. L., 1890, p. 1074.

Egan's rights under his original entry and purchase of this land remained in full force after his payment was made and received by the United States, and the issuance of the certificate, and were not divested by the *ex parte* action of the Commissioner; and were fully confirmed, and all obstacles were removed to the issue of a patent to him, by the order of February, 1883. It is, however, suggested in the argument for the plaintiff, that this order of reinstatement was made after the commencement of this suit, as if the defendant could only interpose such defenses in an action of ejectment, as were actually vested in him at the commencement of the suit. We do not understand that any such rule applies to the defenses, that may be interposed, and if this order of reinstatement was essential to the defense in this case (which we deny), it is immaterial whether it was entered before or after the suit commenced.

We submit, in concluding this branch of the argument, that the State court ruled properly in holding that he was a purchaser from the United States within the meaning of the act of 1852, and that the County of Cook could not under that grant acquire or hold valid title against him or the defendant claiming title under him.

The point, which is argued at length, that an action of ejectment must be determined by the legal title alone, and equitable defenses cannot be interposed, presents a

question which this court will not consider, but which requires no further answer than a reference to the provision of the Illinois statute, which we have already cited (R. S., Ch. 51, § 20) that the holder of the Register's certificate of entry can protect his possession thereunder in ejectment.

On the trial in the Circuit court of Cook county, the defense was made that this land was expressly reserved from sale on September 20, 1850, by the Commissioner of the General Land Office, in accordance with the proclamation of the President, being situated within six miles of the location of the Illinois Central Railroad, and, therefore, did not pass to the state under the subsequent grant of Congress of September 28, 1850. The necessary evidence was introduced to show the reservation of this land, and together with it the opinion of Mr. McClelland, Secretary of the Interior, of November 20, 1855, to the effect that this reservation operated as any sale, and took this land out from the public domain, and therefore it did not pass to the state under the subsequent grant. The Supreme court, however, expressly declined to consider this question, and it did not, therefore, enter into the judgment, which it is here sought to review. We do not consider that this question can properly be considered by this court on this writ of error, or that it would be proper for us to argue it. We do not wish, however, to be understood as waiving the question absolutely.

We respectfully submit, in conclusion, that this writ of error should be dismissed for want of jurisdiction; but if this court shall take jurisdiction, and shall review the judgment of the State court, that the judgment of the State court should be affirmed.

CHARLES M. OSBORN, and
SAMUEL A. LYNDE,
Counsel for the Defendant in Error.

Supreme Court, U.S.
FILED,
JAN 8 1891
JAMES H. MCKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 1406.

THE COUNTY OF COOK,
Plaintiff in Error,
vs.
THE CALUMET and CHICAGO CANAL and DOCK COMPANY,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Illinois.

ADDITIONAL SUGGESTIONS ON BEHALF OF DEFENDANT IN ERROR.

CHARLES M. OSBORN AND
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We find, on reconsidering our argument, and an examination of the reply brief submitted by the plaintiff in error, that it is best for us to submit some additional suggestions on behalf of the defendant in error.

One question which might, from one point of view, be thought to be presented by this record, but which was not, in fact, considered or in any way passed upon by the State court, and did not enter at all into its decision, we had omitted to call to the attention of the court. That question is this: Did not the State of Illinois have full

power and authority to amend, enlarge or abridge the terms and conditions of its grant of these swamp and overflowed lands to the counties, and could the act of the Legislature of March 4, 1854, amendatory of the act of June 22, 1852, be held to be invalid, as impairing the obligation of a contract between the state and the counties? Perhaps a better way of putting this question would be: Was the act of June 22, 1852, a contract between the state and the counties, within the meaning of the constitution, so that the state could not by subsequent legislation alter the terms and conditions of its grant?

We have already argued that the decision of the State court is based upon its construction of the second section of the original grant, and upon the conditions which the state thereby imposed upon its grant, and not upon any subsequent conditions created by the act of March 4, 1854; and that the act of March 4, 1854, did not in any particular add to or change the conditions which the second section of the act of June 22, 1852, imposed upon the grant, but related solely to the manner in which these conditions should be given effect. And as the construction, given to the Act of 1852, by the State court must in this case be held conclusive upon this court, and cannot be reviewed here, this question which we now suggest, is not in fact raised by this record.

Moreover, as we have shown in our prior argument, no question was raised in the State court by the plaintiff in error as to the validity of the Act of March 4, 1854, or decided by that court; so that no question can be raised in this court as to whether the amendatory act of March 4, 1854, did alter or impair the grant of the Act of June 22, 1852, or as to whether the Act of June 22, 1852,

vested in the counties such an interest in these swamp lands, that the state could not thereafter, without their consent, alter the terms and conditions of its grant.

Assuming, however, that the question as to the right and power of the state to enlarge or alter the terms and conditions of this grant to the counties is before this court on this record, we claim that the county was merely an agency of the state, appointed by it to receive and dispose of these lands for public purposes, and that by this grant, these swamp lands were given to the counties by the state as public property, for public uses, and that the state had full power and authority to amend and change the conditions of its grant by subsequent legislation. The State could have revoked the agency altogether, and have put an end to the existence of the county, had it seen fit. The grant of these swamp and overflowed lands from the state to the counties, is in no sense analogous to their grant to the states by the United States. That grant was a contract between sovereign powers, the terms of which, the United States could not thereafter alter, without the consent of the state. The grant was made to the state by the United States for a public purpose, which was expressed in the second section of the act of September 28, 1850, to wit: To enable the state to reclaim lands by means of levees and drains. But it gave the state full power to dispose of the lands, and only gave directions as to the application of the proceeds, as far as necessary for that object; so that the security for the application of the proceeds thus pointed out, rested in fact upon the good faith of the state, and the state could exercise its discretion in that behalf, without being liable to be called to account, and without affecting the titles to the lands

disposed of; and the state's paramount title to this land under this grant, cannot be questioned.

Emigrant Company v. *County of Adams*, 100 U. S., 69.

On the other hand the county is merely a subdivision of the sovereign power, which resides in the state; it is purely a creature of the state for political purposes existing at the will of the state; and it cannot for itself acquire or hold any rights by contract with the State, which the state cannot take from it at its pleasure.

The only limitation to the power of the state over the county is that it cannot take away rights and property, which are in the nature of private rights and property, which can only be the case, when such property and rights are held in trust for the benefit and use of some particular community; but this exception exists for the benefit of the community in question, and not of the county itself, the existence of which the state may at any time put an end to. But when a county holds property for a general public purpose as an agency of the state, and not solely for the use and benefit of a particular community, the state has the right and power to revoke this agency or change and alter the terms and conditions upon which it is held by the county.

Richland County v. *Lawrence County*, 12 Ill., 1.

Sangamon County v. *Springfield*, 63 Ill., 66.

Dillon on Municipal Corporations, § 68.

Cooley on Constitutional Limitations, 238.

It cannot be questioned that the grant by the state of the swamp or overflowed lands was purely for general

public purposes. The state selected the counties as its agents to carry out the public purposes, for which these ands were given to it by the United States; and there can be no serious question but that the state had full power to revoke this agency at any time or to change and alter the terms and conditions of its grant.

In *Supervisors of Whitesides Co.* v. *State's Attorney, etc.*, 31 Ill., 68, 79, the Supreme court of Illinois held that the disposal of these swamp lands was a question of state policy wholly to be determined by the legislature, and that the power of the legislature to change its policy in regard to these lands and change the disposition thereof could not be questioned.

It was evidently the intention of the state to have these swamp and overflowed lands sold and the proceeds applied to the public purposes specified in its grant. They were not given to the counties to keep and retain for their private use, but for the express purpose of having them sold by the counties, and the proceeds applied to the public purposes specified. It cannot be successfully contended that the state did not have the power to subsequently select some other agency or means of selling these lands, and that it could not provide thereafter that the United States might sell any of these swamp or overflowed lands, and, in case of such sales, the counties should receive the moneys paid to the United States therefor instead of the lands; and this was in substance the effect of the state legislation as to these lands, taken in connection with the legislation of the United States.

In their reply brief counsel discuss the nature of this grant to the counties (pages 28 to 30), and contend that it was a contract, under which a title and interest in the swamp and overflowed lands vested in the counties, of

which the state could not divest them subsequently. They ignore the vital point, that these lands were granted to the counties to sell and dispose of and apply the proceeds to specified public purposes; so that nothing in the nature of a private right or title in these lands vested in the counties.

Upon the question of the jurisdiction of this court, counsel for plaintiff in error claim in their reply brief that if a single federal question is found in the record it will confer jurisdiction upon this court, to pass upon the case upon its merits, and to consider and determine questions which would not properly confer jurisdiction in themselves. We believe that we are correct in our view that this court will only take jurisdiction of a case, brought to it upon a writ of error to a state court, where it affirmatively appears both that a federal question was presented for decision in the State court, and that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

Johnson v. *Risk*, U. S. Supreme Court: Opinion filed December 8, 1890.

And the jurisdiction of this court does not extend to a review of the entire case and of all the questions presented in it, but solely to the federal questions which were in fact raised in and decided by the State court; so that whatever questions there may be in this case, which were not in fact federal questions presented to and decided by the Supreme court ofIllinois, and did not necessarily enter into its judgment, cannot be considered and argued before this court.

Another erroneous proposition on the question of juris-

diction advanced by counsel for plaintiff in error in their reply brief, is that the question as to the jurisdiction of this court on this writ of error cannot be raised and argued by the defendant in error except in the form of a motion to dismiss the writ of error.

It is asserted by counsel in their reply brief (pages 6, 7), that the opinion of the Supreme court of Illinois is based upon the Act of Congress of March 3, 1855, and sought to enforce that act and in so doing denied the plaintiff's right and title under the Act of Congress of September 28, 1850. This construction of the opinion of the Supreme court of Illinois is palpably erroneous. It is the legislation of the State of Illinois under which the Supreme court held that the county of Cook did not acquire or hold valid title to this land against Egan and those claiming under him. The Act of Congress of March 3, 1855, is simply referred to by the Supreme court for the purpose of showing the existence of the same intention on the part of Congress which had led the state to impose upon its grant to the counties conditions for the protection of purchasers of the swamp lands from the United States.

Counsel further claim that the Supreme court of Illinois by its judgment declared the grant of June 22, 1852, not to be a contract with the plaintiff. We understand that they mean by this statement that the Supreme court of Illinois held that under the act of June 22, 1852, nothing was granted to the plaintiff. This is a singular perversion of the opinion of the State court. The State court did not pass upon the effect of the grant, but based its judgment upon the construction which it gave to the express conditions, which were imposed upon this grant by the second section of the act of 1852, under which it

held that as to the land in controversy, the county of Cook could not acquire and hold legal title against Egan and those claiming title under him.

Counsel apparently claim that because the State court would take judicial notice of the several acts of the Legislature of Illinois and of Congress, which have been adopted concerning these swamp lands, it was not necessary for the plaintiff to present any question in the State court as to the validity of any of these acts. We understand that any such question must be raised in the State court, and decided by it, and not presented for the first time in this court. This applies to every question on which counsel seek to found jurisdiction in this court to review the judgment of the State court, and particularly to the question suggested by them as to the validity of the act of the Legislature of March 4, 1854.

The question as to the effect of the endorsement of cancellation made upon the duplicate register and receiver's certificate of the Egan entry, on file in the general land office, is argued by counsel in their reply brief more elaborately than we had expected, considering the tenor of their original argument. They had in that argument stated expressly (p. 92) that "the plaintiff does not claim "that the register or the land commissioner or the Secre- "tary of the Interior could arbitrarily, or as a judicial "act, cancel a valid entry of land;" and thereupon they argued that the endorsements upon this duplicate certificate of entry tended to show that this cancellation was made, in fact, at the request of Egan.

We, therefore, did not enter into an elaborate discussion of the general duties and powers of the Commissioner of the Land Office; but accepted the statement of counsel as an admission that an attempted cancellation,

made arbitrarily and *ex parte* by the commissioner, would be a nullity and without legal effect. We contended, in the first place, that no question was, in fact, raised or decided by the State court in reference to the authority of the Commissioner of the Land Office to cancel this entry; and we showed that the only questions which were raised in the State court by the plaintiff in error in reference to this attempted cancellation were solely as to whether the certified copy of the certificate with the endorsements thereon was admissible in evidence, and as to what, if any, presumption should be held as a matter of evidence to arise from the endorsement of cancellation.

The judgment of the State court did not involve in any way a decision as to the authority of the commissioner. The only question that was in fact decided by the State court, and before it for decision in reference to the Egan entry, was as to whether Egan was a purchaser from the United States within the meaning of the second section of the act of the legislature of Illinois of June 22, 1852, and of the amendatory act of March 4, 1854. This was purley a question of the construction to be given to that State statute, and did not involve any federal question. The cases of *Headley* v. *San Francisco*, reported in 94 U. S., 4, and 124 U. S., 639, where the claim of title asserted by the plaintiff in error depended upon the effect to be given to the act of the legislature and the ordinances, and not upon the act of Congress, and it was, therefore, held that no federal question was raised, are very analogous to the present case.

We contended in the second place, that there was no cancellation in fact of the entry, but simply a cancellation of the location of the defective warrant, and a substitution,

with the express consent of the officers of the land department, of another warrant in its place; that the endorsement made by the register showed clearly that this substitution was made at that time, and the second warrant then deposited with the register and receiver; and that the endorsement made by the commissioner, bearing the same date, purporting to cancel the entry, was clearly erroneous, and instead of it the order should have been the order made in 1883, confirming the action of the register and receiver and allowing the substitution. We also contended that the commissioner of the land department has no power *ex parte* and arbitrarily to cancel an entry; that he has supervisory power over the action of the register and receiver, and can cause their clerical mistakes to be corrected; but that he cannot amend and set aside a certificate of entry issued by them, except upon an investigation and hearing had with notice to the entryman, in which case the commissioner acts in a judicial capacity, and his finding is conclusive as to the facts, subject to review by the Secretary of the Interior on appeal. To give, however, the color of legal authority to his order purporting to annul an entry or set aside a certificate of entry issued by the register and receiver, it must be shown that the order was made upon a hearing before him, had after due notice to the parties in interest; and without a record showing such hearing, the order itself can have no sanction or legal effect, and no presumption of legal validity can be given to it. In other words, the commissioner has no power or authority to arbitrarily or *ex parte* amend and set aside an entry, and cancel the certificate of entry issued by the register and receiver.

In the present case it is apparent from the endorse-

ments on this certificate, that the commissioner's act must be construed either as a clear error on his part, in which case it must be held that he had no intention of attempting to cancel the entry, but simply to cancel the location of the defective warrant, or that it was an arbitrary, *ex parte*, attempt to annul and set aside the action of the register and receiver and rescind the purchase made by Egan without giving him a hearing and without notice to him, and without refunding to him the consideration paid by him for this land. There was no evidence of any hearing or investigation had before the commissioner; no charges of bad faith or fraud were brought in the land office against this entry; and there was nothing apparent upon the record in the land office itself which in any way indicated action on the part of the commissioner in a judicial capacity, or showed any basis or ground whatever for the attempted cancellation. Upon its face it purported only to be his *ex parte* act, done arbitrarily and without hearing; and it did not give rise to any presumption of validity or legality.

In their reply brief counsel argue at length that there is a general jurisdiction and power of supervision and review given to the commissioners over the action of the register and receiver, which includes the power to correct errors or mistakes committed by them; that the indorsement "canceled" must be taken to be the judgment of the commissioner, that the entry was improper and he would not allow it, and did not prevent an appeal by the entryman, and no appeal being taken the action was confirmed by the entryman. That if "*under any circumstances the commissioner had jurisdiction to cancel this certificate upon a hearing, or at the request of its holder,*

"* * * *in those events such action is conclusive*(p. 27)"; and they claim that Egan and his assigns had full knowledge of this action, and acquiesced in it, until after this suit was commenced.

The difficulty with this argument is that there is nothing in the present case that tends to show that the attempted cancellation of the entry by the commissioners was done in the exercise of any supervisory power over the action of the register and receiver. They had suspended the location of the defective warrant, and had allowed Egan to substitute another warrant in its place, and had received from him this second warrant. Without any hearing or notice, and indeed without acting on this substitution of warrants, the commissioner proceeds of his own motion to cancel the entry itself. We submit that this action on his part was not within his power, and was without legal effect. The suggestion that Egan had notice of the attempted cancellation or consented to it, is wholly unwarranted. As to him the transaction with the register and receiver was closed by his obtaining their consent to the substitution of warrants, and by his making this substitution. On the suspension of the original warrant, it is evident that he sought to perfect his entry by obtaining leave to make this substitution, and having done this with the consent of the officers of the land department, he had no reason to expect that the commissioner would attempt to set aside the entry.

The authorities, cited by counsel in their reply brief on this point, deal wholly with the general power of the commissioner and the Secretary of the Interior to supervise the action of the register and receiver, and in the

proper case after investigation and due notice to the parties interested to set aside fraudulent entries, and to correct mistakes. This power we do not question; but we claim, that the attempted cancellation in this case was not done in the excercise of it, but was purely *ex parte* and done arbitrarily, without hearing or notice, and therefore was without legal effect.

Respectfully submitted.

CHARLES M. OSBORN,
SAMUEL A. LYNDE,
Counsel for Defendant in Error.

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138-656

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1266. 878

THE CITY AND COUNTY OF SAN FRANCISCO, APPELLANT,

vs.

EUGENE LE ROY, GEORGES LE ROY, AND RENÉ DE TOCQUEVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 1, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1266.

THE CITY AND COUNTY OF SAN FRANCISCO, APPELLANT,

vs.

EUGENE LE ROY, GEORGES LE ROY, AND RENÉ DE TOCQUEVILLE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1. *Bill of Complaint.*

United States Circuit Court, Ninth Circuit, District of California.
In Equity.

VICTOR LE ROY, EUGENE LE ROY, and GEORGES LE ROY
vs.
THE CITY AND COUNTY OF SAN FRANCISCO. } Complaint.

To the judges of the circuit court of the United States for the district of California:

Victor Le Roy, Eugene Le Roy, and Georges Le Roy, citizens of France, now abiding in San Francisco, in said district, bring this bill against The City and County of San Francisco, defendant, a municipal corporation of the State of California, and therefore your orators complain and say—

That the said plaintiffs are natives of France and citizens of the Republique Francaise or French Republic.

That the defendant is a municipal corporation of the State of California, composed of citizens of the United States.

That the matter in controversy in this suit exceeds in value the sum of one thousand dollars.

That the plaintiffs are seized and possessed in fee simple absolute and they and their predecessors in estate for more than ten years have been the owners and seized and possessed of that certain real estate, situate, lying, and being in the city and county of San Francisco, bounded and described as follows:

Commencing at the intersection of the southeasterly line of Harrison street with the southwesterly line of Eleventh street, thence running southerly along said line of Harrison street one thousand and sixteen feet and ¼ of an inch (1,016 ft. ¼ in.); thence at right angles easterly to the middle of Mission creek; thence down Mission creek, following the middle thereof, northerly and northeasterly to the southwesterly line of Eleventh street; thence northwest-

2 erly along Eleventh street to a point distant two hundred and ninety-four (294) feet seven (7) inches southeasterly from Harrison street; thence at right angles southwesterly one hundred and thirty-seven (137) feet and six (6) inches; thence at right angles northwesterly and parallel with Eleventh street one hundred and thirty-seven (137) feet and six (6) inches; thence at right angles northeasterly one hundred and thirty-seven (137) feet and six (6) inches to the southwesterly line of Eleventh street, and thence at right angles northwesterly one hundred and fifty-seven (157) feet and one (1) inch to the point of commencement.

And plaintiffs further allege that the said defendant sets up some claim of title to the said real property or to some portion thereof adversely to the said plaintiffs, which claim is without right or justice and wholly unfounded in law or equity, and said defendant has assumed to make surveys within the limits of the said land

above described and to mark out and lay down lines of streets and to subdivide a portion of the said real property into lots, and has made a map thereof and threatens to sell such subdivisions and lots and to open said streets, and in divers other ways assumes to exercise acts of ownership over the said real property, to the slander and disquieting of plaintiffs' title, the depreciation of its market value, and to hindrances and prevention of the sale or use thereof, to the manifest injury, loss, and detriment of the plaintiffs.

And plaintiffs further show that they deraign title to all but a small part of said real property—that is to say, to so much thereof as is contained within the boundaries of the tract next hereinafter stated and which plaintiffs aver include the land over which the said defendant asserts its said unjust claims by divers mesne conveyances from William I. Shaw, who, on the 28th day of March, 1861, commenced his suit in the district court of the 12th judicial district in and for the city and county of San Francisco against the said "The City and County of San Francisco," the defendant herein, to quiet his title to all that piece of land particularly described in the said complaint and in the decree of said court, and that the claim of defendant might be determined in that action, and that the title of the plaintiff in said action might be established and declared valid, and that it might be decided that defendant had no title,
3 claim, or interest in the said land, and the said defendant was duly served with summons and appeared therein by attorney, and such proceedings were in said cause afterwards had that afterward, on the 5th day of February, 1862, the said court made and entered its final judgment and decree, whereby it was, among other things, ordered, adjudged, and decreed that the pretended claim of defendant of, in, and to the premises thereinafter described and every part thereof was invalid and void and the title of said plaintiff in and to said premises was good, valid, and sufficient as against said defendant and against all and every person or persons claiming or to claim the same through or under said defendant since the commencement of that action, and it was further ordered, adjudged, and decreed that said defendant and all persons claiming through or under them be forever barred and restrained from claiming or asserting any estate, title, or interest of, in, and to the premises thereinafter described or any part thereof adverse to the title of said plaintiff.

The boundaries of said premises are as follows:

Beginning at the intersection of 14th or Tracy street and Mission creek, and running thence along Mission creek to Eleventh or Wood street; thence along 11th or Wood street to Harrison street; thence along Harrison street to 12th or Brown street; thence along 12th or Brown street to Folsom street; thence along Folsom street 360 feet, more or less, to a private street called East 13th street, being nearly on a line with 13th or Ellen street; thence easterly along said private street to the northerly line of 13th or Ellen street extended to Harrison street 275 feet; thence southerly and parallel to Folsom street 350 feet, more or less, to a point on the northerly line of 14th or Tracy street 275 feet easterly from the easterly line of

Folsom street, and thence along 14th or Tracy street to the place of beginning.

And plaintiffs further show that the said judgment and decree still remain in full force and virtue, never having been appealed, reversed, or vacated, and they insist that the said defendant is, by the record of the said judgment, estopped from claiming or pretending to any right, title, or interest in the said lands in said decree described.

Wherefore plaintiffs pray for process of subpœna to the said defendant, The City and County of San Francisco, requiring the
4 said defendant to appear and answer this bill, and that the said defendant may file its direct and perfect answer to the matter of this bill as if specially and particularly interrogated thereto without oath, which is hereby waived, and, according to the best and utmost of its knowledge, remembrance, and belief, that said defendant may be required to set forth in its answer whatever right, title, or interest it may claim to have in the said real property or any part thereof at law and in equity and the source and origin of such title, to the end that this honorable court may determine upon the validity thereof, and that by the final decree of this honorable court it may be determined, adjudged, and decreed that the plaintiffs are the owners of the said real property herein first above described and every part thereof, and that the defendant has no right, title, or interest therein at law or in equity, and that the claims and pretensions of the said defendants thereto are unfounded in law or equity, and that plaintiffs may have such other or further relief as to equity shall seem meet, with costs.

B. S. BROOKS,
Sol'r and of Counsel for Pl'ffs.

DISTRICT OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Victor Le Roy, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

VICTOR LE ROY.

Subscribed and sworn to before me this 26 day of October, A. D. 1883.

[SEAL.] SAM'L S. MURFEY,
Notary Public.

Endorsed: Filed October 26, 1883. L. S. B. Sawyer, clerk.

5 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

The President of the United States of America to the City and County of San Francisco, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the third day of December, A. D. 1883, to answer a bill of complaint exhibited against you in said court by Victor Le Roy, Eugene Le Roy, and Georges Le Roy, who are citizens of the French Republic, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26 day of
[SEAL.] October, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the 108.

L. S. B. SAWYER, *Clerk.*

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday in December next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

L. S. B. SAWYER, *Clerk.*

6 Endorsed.

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 26th day of Oct., 1883, and personally served the same on the 26th day of Oct., 1883, by delivering to and leaving with Washington Bartlett, mayor of The City and County of San Francisco, said defendant named therein, personally, at the city and county of San Francisco, in said district, an attested copy thereof.

M. M. DREW, *U. S. Marshal,*
By B. J. AKERMAN, *Deputy.*

Filed October 30th, 1883.

L. S. B. SAWYER, *Clerk.*

In the United States Circuit Court, Ninth Circuit, District of California. In Equity.

VICTOR LE ROY, EUGENE LE ROY, and GEORGES LE ROY
vs.
THE CITY AND COUNTY OF SAN FRANCISCO.

The Answer of the Defendant, The City and County of San Francisco, to the Bill of Complaint of Victor Le Roy and Others, Plaintiffs.

The defendant, answering the said bill, saith:

It denies that the plaintiffs or any of them are or ever were seized in fee simple absolute or of any estate or interest in or pos-
7 sessed of any portion of the real estate described in said bill. This denial is made upon information and belief.

The defendant, further answering, avers that the defendant is now and for more than ten years last past has been continuously the owner seized in fee simple absolute and possessed of all of the said real property. This allegation is made upon information and belief.

The defendant avers that the plaintiff ought not to maintain this suit, because neither they nor their predecessors or grantors were, nor was any of them, seized or possessed of any part of said real property within five years next before the filing of the said bill; but, on the contrary, the defendant has been during all said time in the complete, open, and notorious possession of all said property, and had the same enclosed with substantial fences sufficient to turn any cattle, and claimed adversely to all the world to own all said real property in good faith. This allegation is made upon information and belief.

The defendant denies that the plaintiffs or any of them deraign title from one William J. Shaw as to any of said real property or any part thereof. This denial is made upon information and belief.

The defendant denies that the said Shaw ever commenced any action against the defendant to quiet his title to any part of said premises in any court, and denies that any court ever made or entered its judgment determining that the title of said Shaw was good or valid, or that the claim or title of the defendant was invalid or void, or barring the defendant from asserting its claim of title as to any part of said real property. This denial is made upon information and belief.

The defendant, having answered the said bill, prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM CRAIG,
Attorney and Counsellor of The City and County of San Francisco, Solicitor.

J. H. MEREDITH, *Counsel.*

Endorsed: Service of a copy of the within answer is hereby acknowledged this 7th day of January, 1884. B. S. Brooks, sol'r

for compl't. Filed 7th January, 1884. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

8 *Complainant's Replication.*

In the United States Circuit Court, 9th Circuit, District of California.

VICTOR LE ROY *et al.*
vs.
THE CITY AND COUNTY OF SAN FRANCISCO.

This repliant, saving and reserving to *himself*, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

B. S. BROOKS,
Sol'r for Compl't.

Endorsed: Filed Feb'y 4, 1884. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

9 At a stated term, to wit, the November term, A. D. 1886, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 3rd day of January, in the year of our Lord one thousand eight hundred and eighty-seven.

Present: The Honorable George M. Sabin, U. S. district judge of Nevada.

Certified Copy of Order Reviving Cause, &c.

VICTOR LE ROY, EUGENE LE ROY, and GEORGES LE ROY, Complainants,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Respondent.
No. 3145.

In this cause it appearing by the stipulation of the counsel for the respective parties thereto that since the commencement of this action and the taking of the testimony by the referee therein Victor Le

Roy, one of the complainants, has died, and that all of his title and interest in and to the premises described in the bill of complaint herein, and to be affected by this action, have passed to René de Tocqueville, who is a citizen and subject of the Republic of France, and who is now the owner and holder of all the right, title, and interest in the premises affected by this action which belonged to said Victor Le Roy at the commencement thereof; and said counsel having further stipulated that as to said complainant, Victor Le Roy, deceased, the said action may be revived in the name of said René de Tocqueville, who shall hereafter be a party thereto in place of said Victor Le Roy, and that all subsequent proceedings herein shall be in his name in the place and stead of said Victor Le Roy, and with like force and effect as though the said de Tocqueville had been the owner of the interest of said Le Roy in the premises affected by this proceeding and a party to this action in the place of said Le Roy, from the commencement thereof, and the said René de Tocqueville having entered his appearance in this cause by Pillsbury and Blanding, his attorneys: It is ordered that this suit be revived and continued against The City and County of San Francisco, respondent therein, as to the complainant, Victor Le Roy, in the name of René de Tocqueville, and that all further proceedings on the part of complainants be continued in the name of Eugene Le Roy, Georges Le Roy, and René de Tocqueville, and with like force and effect as though a bill of review had been filed herein on account of the decease of said Victor Le Roy, and that said René de Tocqueville be placed in the same plight and state and condition of the complainant, Victor Le Roy, at the time of his death, and that said de Tocqueville have the same benefit and relief in this action as the said Victor Le Roy might have had if he had lived and continued a party thereto.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 13th day of June, A. D. 1887.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCKTON,
Deputy Clerk.

Enrollment.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

EUGENE LE ROY *et al.*, Complainants,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Respondent. } No. 3145.

The complainants filed their bill of complaint herein on the 26th day of October, 1883, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon issued, returnable on the third day of December, A. D. 1883, which is hereto annexed.

The respondent appeared herein on the 3rd day of December, 1883, by Wm. Craig, Esq., its solicitor.

On the 7th day of January, 1884, an answer was filed herein, which is hereto annexed.

On the 4th day of February, 1884, a replication to said answer was filed herein and is hereto annexed.

On the 3d day of January, 1887, an order was made and entered herein, a certified copy of which order is hereto annexed.

Thereafter a final decree was filed and entered herein in the words and figures following, to wit:

At a stated term, to wit, the February term, A. D. 1887, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 13th day of June, in the year of our Lord eighteen hundred and eighty-seven.

Present: The Hon. Lorenzo Sawyer.

12 *Decree.*

EUGENE LE ROY, GEORGES LE ROY, and RENÉ DE TOQUEVILLE, Complainants,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Respondent.
} No. 3145. In Equity.

The respondent, The City and County of San Francisco, having heretofore appeared and filed its answer to the bill of complaint in the above-entitled cause, and an order having been duly made in said cause at a stated term of this court, to wit, the November term, A. D. 1886, upon suggestion to this court of the death of Victor Le Roy, one of the complainants, and upon the stipulation of the counsel for the respective parties hereto that since the commencement of this action and the taking of the testimony by the referee therein the said Victor Le Roy had died, and that all his right, title, and interest in and to the premises described in the bill of complaint herein and to be affected by this action had passed to René de Tocqueville, who was and is a citizen and subject of the Republic of France and the owner and holder of all the right, title, and interest in the premises affected by this action, and which belonged to said Victor Le Roy at the commencement of this action, and said counsel having also stipulated that as to said complainant, Victor Le Roy, deceased, the said action might be revived in the name of said René de Tocqueville, who should thereafter be a party thereto in place of said Victor Le Roy, and that all subsequent proceedings herein should be in his name in the place and stead of said Victor Le Roy and with like force and effect as though the said de Tocqueville had been the owner of the interest of said Le Roy in the premises affected by this proceeding and a party to this action in the place of the said Victor —— from the commencement thereof, and an order having been duly made at said November term by this court accordingly, and the said

René de Tocqueville having thereupon entered his appearance in this cause as a party complainant in the place and stead of
13 said Victor ——, and it having also been stipulated and ordered that the said de Tocqueville shall have the same benefit and relief in this action as the said Victor Le Roy might have had if he had lived and continued a party thereto; and this cause having come on to be heard upon the bill of complaint herein, the answer of the respondent, the replication of the complainants, and the proofs, oral, documentary, and written, taken and filed in said cause, and the said cause having been argued by counsel for the respective parties and submitted to the court for consideration and decision:

Now, therefore, upon consideration thereof, it is ordered, adjudged, and decreed that the complainants are now and have been since the 26th day of October, A. D. 1883, the owners and seized in fee simple absolute of all that certain real estate, land, premises, and property mentioned in the bill of complaint herein, and more particularly described as follows, to wit:

All that parcel or tract of land situate, lying, and being in the city and county of San Francisco, State of California, and bounded and described as follows, viz:

Commencing at the intersection of the southeasterly line of Harrison street with the southwesterly line of Eleventh street, thence running southerly along said line of Harrison street one thousand and sixteen feet and one-fourth of an inch (1,016 ft. $\frac{1}{4}$); thence at right angles easterly to the middle of Mission creek; thence down Mission creek, following the middle thereof, northerly and northeasterly to the southwesterly line of Eleventh street; thence northwesterly along Eleventh street to a point distant two hundred and ninety-four (294) feet seven (7) inches southeasterly from Harrison street; thence at right angles southwesterly one hundred and thirty-seven (137) feet and six (6) inches; thence at right angles northwesterly and parallel with Eleventh street one hundred and thirty-seven (137) feet and six (6) inches; thence at right angles northeasterly one hundred and thirty-seven (137) feet and six (6) inches to the southwesterly line of Eleventh street, and thence at right angles northwesterly one hundred and fifty-seven (157) feet and one (1) inch to the point of commencement.

And it is further ordered, adjudged and decreed that the
14 respondent, The City and County of San Francisco, has no estate, right, title, or interest whatever in or to said real estate, land, premises, and property hereinabove described or in or to any part thereof.

And it is further ordered, adjudged, and decreed that the said respondent, The City and County of San Francisco, and any and all persons claiming under it be, and they are, forever debarred and enjoined from asserting any claim or title or interest whatever in or to said real estate, land, premises, and property or in or to any part thereof adverse to said complainants or either of them, and that an injunction issue in accordance with this decree perpetually debarring and enjoining the said City and County of San Francisco and all persons claiming under it from asserting any claim or title or

interest whatever in or to said real estate, land. premises, and property hereinabove described or in or to any part thereof adverse to said complainants or either of them.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

Endorsed: Filed and entered June 14, 1887. L. S. B. Sawyer, clerk.

Clerk's Certificate.

Whereupon said pleadings, subpœna, certified copy of order, and final decree are hereto annexed, said final decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, etc.:

L. S. B. SAWYER, *Clerk,*
[SEAL.] By F. D. MONCKTON,
Deputy Clerk.

Endorsed: Enrolled papers. Filed June 14th, 1887. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

15 *Caption.*

In the Circuit Court of the United States for the Ninth Circuit and District of California.

VICTOR LE ROY *et al.*
vs.
THE CITY AND COUNTY OF SAN FRANCISCO. } No. 3145.

Be it remembered that on the 17th day of December, 1884, and on the several days thereafter to which the examination was regularly continued, at my office, in the city and county of San Francisco, State of California, before me, S. C. Houghton, examiner in chancery of the circuit court of the United States for the ninth circuit and district of California, personally appeared the several witnesses whose names are hereinafter set forth on behalf of the respective parties in the above-entitled suit.

E. S. Pillsbury, Esq., appeared as counsel for complainant; J. H. Meredith, Esq., as counsel for respondent.

Following is a copy of the proceedings:

WEDNESDAY, *December* 17, 1884.

Present: Mr. Pillsbury, of counsel for complainant; Mr. Meredith, of counsel for respondent.

EXHIBIT "A."

Complainant introduced in evidence certified copy, from the office of the county clerk of the city and county of San Francisco, of judgment-roll in the case of William J. Shaw *vs.* The City and County of San Francisco, in the district court of twelfth judicial district of

the State of California in and for the city and county of San Francisco, number 8597, marked "Complainants' Exhibit A."

16 (Objected to by respondent on the ground that respondent did not have the power to submit its title in said cause.)

EXHIBIT "B" and Stipulation.

Complainant also introduces in evidence map of the premises described in the bill, made by George H. Rogers, city and county surveyor, marked "Complainant's Exhibit B."

Respondent admits that the premises described in the bill are correctly delineated upon the map, Exhibit "B."

It is agreed between complainant and respondent that on the thirtieth day of October, 1876, one Theodore Le Roy, who is the ancestor of complainants, acquired by proper conveyance all the right, title, and interest of William J. Shaw, mentioned in the judgment-roll, Exhibit "A," in and to all that portion of the premises situated in the city and county of San Francisco, State of California, and described in the decree in said judgment-roll, of which the following is a description, namely:

Beginning at the southeasterly corner of Harrison and Eleventh streets and running thence along the southwesterly line of Eleventh street southeasterly one hundred and fifty seven feet; thence at right angles to Eleventh street southwesterly one hundred and thirty-seven feet six inches; thence at right angles southeasterly one hundred and thirty-seven feet six inches; thence at right angles northeasterly one hundred and thirty-seven feet six inches to the southwesterly line of Eleventh; running thence along the southwesterly line of Eleventh street southeasterly one hundred and twenty-five feet five inches; thence south seventy-seven and three-fourths degrees west two hundred and thirty-nine feet and three inches; thence south forty-eight degrees west seventy-six feet six inches; thence south fifty-three and three-fourths degrees west ninety-six feet three inches; thence south eleven and three-fourths degrees west one hundred and nineteen feet five and one-fourth inches; thence south thirty-two and three-fourths degrees west thirty-two feet one and one-half inches; thence south three and one-half degrees west three hundred and eighteen feet eight and one-half inches; thence westerly and parallel to Alameda street one hundred and four feet to the easterly line of Harrison street; thence northerly along the easterly line of Harrison street ten hundred and sixteen feet and one-

17 fourth of an inch to Eleventh street, the place of beginning, being a part of Mission block 46 and New Potrero block number 5½.

It is further in like manner agreed that on the 31st day of October, 1876, the said Theodore Le Roy acquired, by conveyance in due form, all the right, title, and interest of the said William J. Shaw in and to that portion of the premises mentioned in said decree, which are described as follows:

Beginning on the southerly line of Eleventh street four hundred and twenty feet east of the easterly line of Harrison street, run-

ning thence easterly along the southerly line of Eleventh street eleven feet, more or less, to the northerly line of Mission creek, as laid down by the board of supervisors and approved March 24th, 1874; thence along the northerly boundary of said creek south seventy-nine degrees thirty minutes west one hundred and sixty-seven feet; thence south fifty-one degrees west two hundred and thirty-one feet to the easterly line of Columbia street; thence northerly along the easterly line of Columbia street thirteen feet; thence north thirty-three degrees forty-five minutes east eighty-seven feet to the north line of Channel street; thence north forty-eight degrees east seventy-six feet six inches; thence north seventy-seven degrees forty-five minutes east two hundred and thirty-nine feet three inches, to the place of beginning.

Respondent admits that since the date of said conveyances from Shaw to Le Roy the said Le Roy has died, and that all his interest so as aforesaid acquired upon his death vested in the complainants, who are still the owners of the same.

Continued, by agreement of counsel, to Wednesday, 24th instant, at ten o'clock a. m.

WEDNESDAY, *December* 24, 1884.

Present: Mr. Pillsbury, of counsel for complainants.

Counsel for respondent not appearing, the examination is further continued, at the request of complainant's counsel, to Monday, 29th instant, at ten o'clock a. m.

MONDAY, *December* 29, 1884.

Present: Mr. Pillsbury, of counsel for complainant; Mr. Meredith, of counsel for respondent.

18 For the purpose of enabling the court, upon the hearing of this cause, to understand intelligently the location of the premises in question and the different sources of title under which complainants claim, respondent admits that the tract enclosed within the red or pink lines upon the map, Exhibit "B," represents what is termed the original Shaw claim, provided that claim went only to the westerly line of Mission creek; that if said claim went to the center of Mission creek, then it extended to the blue line shown on the map to the right of said red or pink line; that a portion of the premises mentioned in the bill and claimed by the complainants under the Shaw and Kissling title is included in that portion of the tract represented on said map to the east of Harrison street and north of the red or pink line crossing Harrison street on the northerly line of Fourteenth street; that the premises claimed by the complainants in this suit are included within the blue lines on said map, Exhibit "B;" that that portion of the premises within the green lines and marked "Old Channel St." represents the portion of said tract in controversy in this suit.

Complainants do not admit that there ever was any street at the place marked on said map "Old Channel St.," and it is only so represented on the map, Exhibit "B," for the purpose of indicating

the land in controversy herein, and complainants expressly disclaim any admission by marking the portion of the premises referred to as "Old Channel St.," and expressly state that it is only so delineated on the map for the purpose of representing the controversy between the parties to this suit.

Respondent further admits that a portion of the premises in dispute lying south of the red line protracted easterly from Harrison street from the northerly line of Fourteenth street and embraced within the line on the map, Exhibit "B," is claimed by the complainants under the Thorne and Center title, evidence of which is to be hereafter introduced, and that the whole premises claimed by the complainants in the bill is included within the blue line and lying to the east of Harrison street, as represented on said map, the claim of the complainants going to the centre of Mission creek, which is so marked on said map, the westerly boundary of said creek being also represented on the said map.

19 Complainants disclaim any admission that Alameda street ever extended from what is represented on the map, Exhibit "B," as Columbia street to the east line of Harrison street, but it is so represented on the map for the purpose of illustrating the questions at issue.

Nor do complainants admit that what is marked on said map as Columbia street ever existed in fact as a street. On the contrary, complainants announce their position to be that what is represented on said map as "Old Channel street," "Columbia street," and "Alameda street," within the exterior limits of the tract in controversy and represented by the blue lines on said map, have never in fact existed as streets.

Respondent does not admit the validity of any source of title claimed by the complainants nor the possession of any one thereunder.

Respondent admits that there is of record in the office of the county recorder of the city and county of San Francisco a deed of grant, bargain, and sale made by John W. Kissling and Maria Kissling, his wife, to William J. Shaw, dated September 12th, 1859, conveying the following-described premises, situated in the city and county of San Francisco:

Beginning where the southerly side of Wood street intersects the channel of Mission creek and running thence along Wood street to the westerly line of Harrison street; thence along the westerly line of Harrison street to the northwest corner of Harrison and Tracy streets; thence along Tracy street to the channel of Mission creek; thence along the channel of Mission creek to the place of beginning.

It is admitted by both complainants and respondent that Wood street, mentioned in the conveyance last above referred to, is now Eleventh street, and that Tracy street, mentioned in said conveyance, is now Fourteenth street.

Respondent admits that there is of record in the office of the county recorder of the city and county of San Francisco, duly acknowledged, a document which is denominated the pre-emption

claim of John W. Kissling, which is in the words and figures following:

"I, John Kissling, a native of Denmark, who declared his intention to become an American citizen eighteen months since in New York, U. S. A., claims a pre-emption right to one hundred and sixty acres of land in the district of San Francisco, Territory of Upper California, described as follows:

"Commencing on Mission creek and running north 40 chains, thence east 40 chains; thence south 40 chains; thence west on Mission creek 40 chains to place of beginning. Said tract adjoins the pre-emption right of John Mattheson.

"Done at San Francisco this 26th day of March, A. D. 1849.

"(Signed) JOHN W. KISSLING.

"Witness:

"D. W. C. THOMPSON.

"Recorded August 17, 1849, Liber H of Deeds, page 7."

(Objected to by respondent as irrelevant and immaterial.)

Respondent admits that there is of record in the office of the county surveyor of the city and county of San Francisco a survey, of which the following is a copy:

"*Survey No.* 233.

"STATE OF CALIFORNIA, *County of San Francisco:*

"AUG. 5, 1850.

"This day surveyed and laid off the following-described piece of land, to wit:

"Commencing on the north side of the road leading from the Mission Dolores to the embarcadero or landing and 31 chains westerly from the principal buildings of said mission, thence north 85° 35′ east following the said side of said road 14 chains 30 links; thence north 1° 5′ east 16 chains; thence north 86° east 15 chains 50 links to the center of the main channel of Mission creek and line of the Harra grant; thence following said line and creek south 35 chains (more or less); thence south 84° 15′ west 23 chains, more or less; thence north 2° 45′ west 16 chains and 66 links to the place of beginning—

"Containing 60 acres (more or less).

"The above-described section or piece of land I laid off on the claim and order of John Centre and Isaac N. Thorne, according to the requirements of the statute. Filed in county surveyor's office."

Respondent admits that John Center and Isaac N. Thorne conveyed to Charles V. Stewart, by deed of grant, bargain, and sale dated July 15, 1854, the premises situated in the city and county of San Francisco, State of California, described as follows:

Commencing at a point on Mission creek north of Tracy street and at the southeast corner of John Kissling's lot where the southern line of fence strikes Mission creek, thence running south 12° 28′ west 6 chains 82 links on Mission creek; thence northwardly and parallel with Tracy street 8 chains 31 links to John Center's ditch or enbankment; thence north 4° west along said embankment 4 chains 5 links; thence 67¼ degrees west 9 chains 24 links to beginning—

Containing 4½ acres.

Respondent further admits that said deed was duly acknowledged on the 15th day of July, 1854, and recorded July 17, 1854, in Liber 43 of Deeds, page 196.

Respondent admits that whatever title passed by the deed last above referred to to Charles V. Stuart was by mesne conveyances prior to October 30, 1876, vested in Eugene L. Sullivan, and that on the last-mentioned date and on the 31st day of October, 1876, said Sullivan conveyed to Theodore Le Roy, the ancestor of complainants, all of said premises included within the tract represented within the blue line on the map, Exhibit "B," below the red line protracted from the north line of Fourteenth street.

The deeds of conveyance referred to from Sullivan to Le Roy have heretofore been referred to in the evidence.

It is admitted by both complainant and respondent that all the title ever acquired by John W. Kisling and William J. Shaw to the premises in controversy lying to the north of the north line of Fourteenth street produced easterly and east of Harrison street passed by mesne conveyances and descent to the complainants prior to the commencement of this suit.

22 *Deposition of Isaac N. Thorn.*

Examination-in-chief of ISAAC N. THORNE on behalf of complainant by Mr. PILLSBURY:

Q. 1. State your name, your place of residence, and your business, and what, if anything, you know in relation to the premises in controversy in this suit.

A. Isaac N. Thorne; San Francisco; attorney-at-law. I have resided in the city and county of San Francisco since 1849. I am the Isaac N. Thorne mentioned in the survey number 233, which has been referred to, and also in the deed from John Center and Isaac N. Thorne to Charles V. Stewart, dated July 15, 1854.

Referring to the map, Exhibit "B," the premises lying to the south of the north line of Fourteenth street prolonged across the blue line are included in that survey number 233. On August 5th, 1850, John Center, Charles V. Stewart, and myself had our residence upon the tract of land shown in that survey, and had the premises enclosed and protected from intrusion. That survey includes marsh land and upland or land that could be cultivated. The upland was under cultivation at that time. The upland continued to be cultivated from the date last mentioned up to July 15, 1854. Refer-

ring to that tract enclosed within the blue line and lying south of the north line of Fourteenth street extended east from Harrison street, that tract formed a part of the sixty-acre tract that was in possession of Center, Stewart, and myself, and which was described in the survey number 233. The only enclosure that touched this smaller tract referred to was the division fence between the Kissling tract and our tract running along the north line of Fourteenth street extended easterly to Mission creek. With reference to the tract represented on the map, Exhibit "B," south of the north line of Fourteenth street prolonged from blue line to blue line and within the exterior limits of the blue line from 1850 to 1860, that was not cultivated by Stewart, Center, and myself, but the possession was protected during that period, to my knowledge, by exterior fences. The reason why it was not cultivated was because it was marsh land. As to acts of occupation and ownership, a fence was built along the north line of Fourteenth street prolonged along the north side of our tract, and, as I have stated, that
23 smaller tract within the blue line south of the red line along the north line of Fourteenth street extended was included within the exterior lines of the whole tract included in the survey number 233 referred to, which was entirely enclosed and occupied by myself, Stewart, and Center. The John Center mentioned in the deed of myself and John Center to Stewart, dated July 15, 1854, is the same John Center mentioned in the survey number 233. After the time of the date of that deed Stewart continued to protect from intrusion by enclosure the smaller tract referred to south of the north line of Fourteenth street extended and within the blue line up to 1860, to my knowledge. I know of no other act of occupancy or possession. I have known the premises from 1849 down to the present time. At the time a conveyance was made from Stewart to Sullivan through other parties I was not so familiar with the premises as earlier. I was familiar with them down to the time of the conveyance of Center and myself to Stewart, which has been referred to, July 15, 1854. Down to that time I knew the premises very intimately, and I know that after that time Stewart continued to possess and keep control and possession by keeping the fences in repair, protecting the premises from intrusion for several years up to 1860.

I have spoken of the fence on the north side of the smaller tract just referred to running along the prolongation of the north line of Fourteenth street as being a boundary line between our tract and the Kissling tract. By the Kissling tract I mean a tract which was claimed and occupied by John W. Kissling as early as 1849. He had a house on the premises and resided there and cultivated a portion of them, and he had a brick-yard upon those premises also. At the time of my first acquaintance with the Kissling tract there were no streets nor lines laid down on any map of these premises nor laid out upon the ground. I should judge from the map, Exhibit "B," that Kissling's house was located southerly from Eleventh street, near Mission creek. I should think it was between the creek and the fifty-vara lot excluded from this tract within the blue line

and fronting on the southwesterly side of Eleventh street southwesterly from that lot and not very far from the creek. That portion of the premises in dispute, lying to the east of Harrison street and above the north line of Fourteenth street, produced east-
24 erly and enclosed within the blue line on the map, Exhibit "B," was a portion of this Kissling tract. In 1849, when I first knew these premises, Kissling was residing upon them and claiming one hundred and sixty acres, and I think they were entirely enclosed. Of course, they were bounded by Mission creek on the south and east. In one place Mission creek runs nearly north and south and then it turns and runs nearly east and west. Kissling kept some stock upon the premises, and he had a small garden there, I think, as early as 1850, and, I think, in 1852 or '53, he had a brick-yard and made bricks on the premises. On the exterior lines of his claim he had brush fences. The most of the tract was covered with live oak, and those trees were cut down and piled into fences along the exterior lines of his claim. I have seen those fences in portions; I have never traced the whole line of his fence, but in the portions that I saw the fences were sufficient to restrain cattle within the limits of his claim.

Center's ditch, of which mention is made in some of these conveyances, was a ditch that was intended as an enclosure. Center caused it to be dug there for the purpose of fencing in a portion of the marsh for a hog ranch, and he kept ducks and chickens also in that enclosure. That was, I should say, nearly along the westerly line of Harrison street, as represented on the map, Exhibit "B" (or it may have been farther west than Harrison street), running from Fourteenth street south to Sixteenth street.

I was personally acquainted with John W. Kissling. I also knew William J. Shaw very well. He purchased from Kissling a tract which, I think, is correctly represented within the red line on the map, Exhibit "B," if his purchase only extended to the westerly bank of Mission creek, but which extended to the blue line marked "center of Mission creek," if the title by the conveyance to him passed to the middle of the creek. The conveyance from Kissling to Shaw was made September 12th, 1859. From 1849 or 1850 up to that date Kissling continued in the occupation, dwelling upon these premises and protecting them from intrusion by enclosures and putting them to such uses as he required for his stock and other purposes. Referring particularly to that tract represented on the map, Exhibit "B," within the blue line and lying to the north of the north line of Fourteenth street extended, I know that Kissling was in the continuous and uninterrupted possession of that land from 1849 up to the time of his con-
25 veyance to Shaw, which was September 12th, 1859. I do not know much about Shaw's possession of the portion of the premises in dispute here. A portion of his purchase, which runs up to Folsom street and which is included in the red line on that map, Exhibit "B," was occupied by him and a great deal of money was expended upon it as a public garden, known as the City Gardens. I do not know anything particularly about Shaw's occupation of the

premises lying north of the north line of Fourteenth street and east of the east line of Harrison street. Since that date of 1859 I have not been familiar with them. Up to that time I was familiar with them, and I was frequently in these gardens when he occupied them, but whether or not they extended over on to this tract within the blue line I don't know. I rather think they did, but I am not certain of it.

Cross-examination of ISAAC N. THORNE by Mr. MEREDITH:

Q. 1. You say that some of the land in controversy in this suit was high land and that some was not. What portion of it was high land and what was not?

A. Of the tract lying east of Harrison street and represented within the blue line on the map, Exhibit "B," I should think at least two-thirds was upland. The boundary line separating the dry land from the wet land ran very irregularly through the tract. For instance, at Fourteenth street, between there and the creek, it was all marsh land. Then as you go down the creek the marsh land narrowed down and then spread out again. The line dividing the upland from the marsh land ran across the premises enclosed within the green line upon the map, Exhibit "B," and marked "Old Channel St.," in such a manner that I think more than half of that between Harrison street and the creek was upland. I should say that the line referred to passed near the southerly corner of the fifty-vara lot represented on the map, Exhibit "B," fronting on the westerly side of Eleventh street and excluded from the tract within the blue line; and I should say that that line crossed Eleventh
26 street about half way between the creek and the fifty-vara lot. The ordinary tides did not cover that marsh land. Some portions of it was covered and uncovered by extraordinary tides. I am unable to say what portion of the land indicated on this map, Exhibit "B," constituted the bed of Mission creek as it existed in those days and before any filling-in took place. I think that the land included within the red line marked "west line of Mission creek" and the blue line marked "centre line of Mission creek," as shown on the map, Exhibit "B," includes more land than was covered by the creek. I could not state particularly how much the western line of the creek diverged from the red line referred to, because I have not examined it with reference to that, but I have a general impression that there is more included between those two lines as represented on the map than was covered by the bed of the creek—I should say a half more. I should say that, as represented on the map, it is double the actual width. That is the impression I have. This map of the bed of the creek, as represented on the map, would seem to be about fifty feet wide, which would make the whole bed a hundred feet, and I think there were a great many places in that creek on this tract that were not over thirty feet wide. I have traveled up it in boats a great many times. The creek formed the boundary. The south side of the creek was the De Haro grant or Petrero Nuevo. That was at one time a confirmed Mexican grant,

but afterwards rejected. This creek was so good a barrier that cattle kept upon the Potrero would not pass over. It was generally used as a barrier between adjoining proprietors. The water which overflowed upon these lands from the creek was salt water. The creek was salt and all the overflow was salt. The part that was subject to overflow could be used and was used for useful purposes. In one instance, of which I have spoken, Mr. Center used a portion of it as a duck pond, a duck ranch, and a part of it for a hog ranch; kept a large number of hogs on it, and they fed upon the mussels and crabs and products of the sea. All of these lands referred to are within the city charter line of 1851. The red line upon what is known as the red-line map did not touch these premises at all. The red-line map, made in pursuance of the act of the Legislature of March, 1851, crossed at the mouth of Mission creek, which was a quarter of a mile below these premises, at the intersection
27 of Bryant and Tenth street. I know nothing of the possession of these premises at the present time. About five or six years ago I saw new fences embracing what was supposed to be the bed of Mission creeek. As to who put them there I know nothing except by general report. The general report was that it was done by the city. That was done five or six years ago, I should think; I could not state positively; it may have been longer; it was within a few years past.

Re-examination of ISAAC N. THORNE by Mr. PILLSBURY:

Q. 1. You say these premises are within the charter line of 1851?

A. Yes, sir; they are within the limits of what is known as the Van Ness ordinance.

Q. 2. State whether or not they are, to your knowledge, embraced within any of the exceptions mentioned in that ordinance.

(Objected to by respondent as incompetent, not the best evidence, and also that the question is too general.)

A. I do not think they are included in any of the exceptions. There are no streets, as they existed on the Van Ness ordinance map, embraced in these premises lying east of Harrison street. Referring to the tract on the map, Exhibit "B," within the green lines marked "Old Channel St.," I never knew of any such street existing on the premises. I have seen it marked on the maps. There was no evidence of any street or channel upon the premises, as indicated upon this map, within those green lines.

Q. 3. Did you ever know of any street called Channel street, or otherwise, which would correspond with what is delineated within the green lines upon the map, Exhibit "B," and marked "Old Channel St.?"

(Objected to by respondent as incompetent, not the best evidence.)

A. Not on the ground, and whether it corresponds with the maps that I have seen I could not say. I never knew of any street corresponding with Old Channel street, as laid down on that map, to

be opened or indicated upon the premises in question, by any
28 name. I never knew of Columbia street nor Alameda street running through the premises in question. The streets of the Potrero never were extended across the creek, to my knowledge. What is indicated on the map, Exhibit "B," as Alameda street and as Old Channel street, they never extended across the creek, to my knowledge. If they had extended across the creek and into these premises before 1860 I would have known it. As I have stated, the premises in question were entirely enclosed and occupied, and that there were no streets, in fact, running through them at all from 1849 to 1860. The line of the De Haro grant came to the easterly and southerly bank of Mission creek, the bank to the easterly and southerly of these premises. I am familiar with the Van Ness ordinance map, and I know that none of the streets therein named extended through this tract in question.

I. N. THORNE.

Recess until two o'clock p. m.

MONDAY, *December* 29, 1884—Afternoon.

Present: Mr. Pillsbury, of counsel for complainant; Mr. Meredith, of counsel for respondent.

Deposition of John C. Corbett.

Examination-in-chief of JOHN C. CORBETT on behalf of complainant by Mr. PILLSBURY:

Q. 1. State your name, age, place of residence, and occupation, and what, if anything, you know with reference to the lands within the blue line on the map, Exhibit "B."

A. John C. Corbett; fifty-two years; San Francisco. I have resided in this city and county since August, 1849. Until October, 1849, I resided at the head of Jackson street. I then moved out to the Mission on Sixteenth street, within three or four blocks of the land delineated on the map, Exhibit "B." I first became acquainted with John W. Kissling some time in September, 1849, on what would now be somewhere about the junction of Harrison and a continuation of Thirteenth street. At that time he had a little shanty there and two or three milch cows, and was milking those cows and selling milk. He also had a brick-yard further down on Mission
29 creek. I was very well acquainted with what was known as the Kissling claim out there in that locality. I first became acquainted with the claim itself in 1850. In 1853 Mr. Kissling reduced the outside limits of his claim towards the city of San Francisco, and I helped him to put a wire fence around the balance of his claim. That was some time in March or April—somewhere along there—1853. I was very well acquainted with William J. Shaw. I could not say positively, of my own knowledge, that Kisling transferred his ownership and the possession of his claim to Shaw. I know that Mr. Shaw went into possession of certain portions of that

claim, with the consent of Mr. Kisling, and I understood that Mr. Kisling had made a deed to him of it. I know that possession of a portion of that tract was given by Mr. Kisling to Mr. Shaw. I was very well acquainted, in 1850, with John Center, Isaac N. Thorne, and Charles V. Stuart. Mr. Stuart was at that time living on Sixteenth street; took up a piece of land on Sixteenth street, about Mission street. Mr. Thorne, I think, was also interested with him. I forget whether he was interested with Mr. Stuart or Mr. Center. Elliott J. Moore and Joseph Vaughn Varney took possession of land on the opposite side of Sixteenth street, and below them came Mr. John Center down as far as Mission creek, or what would be now about Harrison and Sixteenth streets. I knew about what was known as the Center and Thorne claim, represented on the plat accompanying survey number 233, a copy of which is before me. I could hardly recollect now when I first knew of that claim. It appears to me that some time in 1850 there was a little dispute as to the boundary line between Mr. Kisling and Thorne and Center. I think that was the first real knowledge that I had of it. About that time there was a boundary line established by mutual consent between the Thorne and Center claim and Mr. Kisling. The first indication of that boundary line was a ditch and a row of poles, willows, planted alongside of that ditch with the intention of making a fence afterwards. There was afterwards a fence made along that line. I don't remember just now how soon afterwards that fence was made. I know they were all friends together; they respected one another's boundaries. This Kisling claim was first enclosed to my knowledge, in 1850, by a brush fence made by cutting brush and piling it up. In 1853 a portion of the claim, that portion towards the north, Mr. Kisling relinquished, and he fenced in the balance with a post and wire fence. He did not relinquish any portion of the premises in question here, indicated on the map, Exhibit "B," not within three or four blocks of it. In 1853, to the best of my recollection, the whole of the Kisling claim represented on this map, Exhibit "B," was enclosed by the enclosure of Mr. Kisling. I wouldn't be positive about these lines represented on the map being exactly correct, but I know that he had the whole of that property enclosed on the north side of the creek, and I know that he had up to the Thorne and Center line, the southern boundary of Kisling's claim. I put the wire fence up for him. After that time, 1853, he had possession of that property up to the time that he moved to Redwood City or shortly before. That was in 1860 or 1861. He had possession up to the time he sold to Mr. Shaw. He had continuous possession all the time—never disturbed by anybody.

With reference to what you have termed the Thorne and Center claim, which lies to the south of the north line of Fourteenth street continued across Harrison to the blue line, all I know about the possession or occupation of that tract by Thorne and Center is that they cut brush there and cleared the land for cultivation. That was about the time that I speak of the settlement of boundaries between them and Kisling, about 1850. In 1853 Thorne and Center had

possession of it. I don't recollect whether any other parties went into possession under them—got possession from them. I always looked upon it as Thorne and Center's property. I don't recollect who they sold to. I do recollect about the Kisling arrangement on account of Mr. Kisling being my brother-in-law and I being familiar with his business. There never was a street running through these premises where these green lines are represented on the map, Exhibit "B." There never was any street marked out there on the land, to my knowledge. None of the streets on the east side of the map were officially laid out until the Van Ness ordinance matter. They were laid out on maps. Reddy made a map here, which was not official, which had some streets laid out on it.

31 Cross-examination of JOHN C. CORBETT by Mr. MEREDITH:

Q. 1. Were you familiar with the lines of the stream of Mission creek in those days?

A. I was. I cannot tell nowadays whether or not the lines that are indicated on the the map, Exhibit "B," as being the bank of Mission creek and the centre line of Mission creek represent the westerly bank and centre of the creek. My impression is they are pretty near to it, although I think that the bend of the creek was a little further east. I think Old Channel street, as it was termed on some of the maps, was laid out with reference to the line of the creek as it then run. I may be mistaken, though. On the Kisling claim the tide never reached that, except it might accidentally in a heavy storm or wind. Sometimes the water of Mission creek after a heavy storm would come up so as to be almost on a level with the ground. It was covered with salt mud grass, but you could travel over it all hours of the day, high tide or low tide, except certain times of the year the tide might accidentally raise a little on it. The tract between Twelfth and Thirteenth, Folsom and Harrison streets, that was all dry sand-hills. I have not been down to that property for, I think, a year. When I last went there I didn't notice what was its condition as to occupation or possession. I know nothing about any fences being put up there around that portion of the land at all since 1862 or '63. Further up, towards Center street, I saw them putting up the fences. The land that I have referred to as being covered with salt grass was capable of being used for useful purposes. Below, on land which was the same kind of salt marsh land, in 1849 Mr. Kisling had two brick-yards and made the most of the bricks that came to San Francisco. They were made right there from the soil on that marsh. They also had a pottery just this side of the brick-yard below these premises on the same kind of land. With reference to these particular premises that I have spoken of as being covered with salt marsh grass, I couldn't hardly say whether they were used for any purpose whatever. Mr. Kisling's house and

32 his garden and things were on a portion of that property shown on Exhibit "B." I think Mr. Kisling's house was at about the intersection of Harrison and Thirteenth street. Westerly of the house he had a garden. On the east side, towards

the bay, his house-lot enclosure extended over into the block bounded on Exhibit "B" by the blue line.

By Mr. PILLSBURY:

Q. 2. With reference to the use of any portion of this land for useful purposes, state whether you know of any portion of it having been used for Chinese vegetable gardens.

A. Not at that time. I am not well acquainted with the land since '61. Prior to '61 they had gardens down there. Mr. Center had gardens all along from Sixteenth street right down to Kisling's; but whether there were Chinamen there or not I don't know. I know nothing about the Kisling and Thorne and Center tracts since 1861. Up to that time they were under cultivation. What I mean is that whatever portion of the land was susceptible of cultivation was under cultivation.

JOHN C. CORBETT.

By agreement of counsel the time within which evidence may be introduced herein is extended to and including the 29th day of January, 1885.

Examination continued by agreement of counsel to to-morrow, 30th instant, at two o'clock p. m.

TUESDAY, *December* 30, 1884.

Present: Mr. Pillsbury, of counsel for complainant; Mr. Meredith, of counsel for respondent.

Deposition of Michael Coyne.

Examination-in-chief of MICHAEL COYNE on behalf of complainant by Mr. PILLSBURY:

Q. 1. State your name, your place of residence, and your business, and what, if anything, you know with reference to the tract of land represented on the map, Exhibit "B," inside of the blue line.

A. My name is Michael Coyne; I live on Eleventh street in this city and county, and my business is contracting. I have
33 lived in that locality since 1865. I live within the limits of the tract represented on the map, Exhibit "B," within the blue line. I have lived there, I should think, about five years. I have been acquainted with that tract represented within the blue line for the last fifteen years. I done work on it in 1876 and in 1877 also, filling in. I was employed to do that by Mr. Grattan, Mr. Eugene L. Sullivan, Mr. Theodore Le Roy. I filled in the whole of that tract from where Twelfth street comes into Harrison, the whole of it, to the south end of the tract. I think I was three or four years doing that. I filled Harrison street up to the grade and filled the tract afterwards. I think I got through filling that tract in in 1880. I remember of the making of a conveyance of this property by Mr. Sullivan to Theodore Le Roy about October, 1876. I done some work of filling in there for Mr. Sullivan before that; I think it was in 1876 or 1877. After Mr. Sullivan sold to Mr. Le

Roy, the work I have done on that tract I done for Mr. Le Roy. Mr. Le Roy paid me for all the work of filling in that I did there after October 30, 1876. The ground settled down and he made me go over it afterwards. I suppose I had to raise it eighteen inches or two feet afterwards. That work I did, I think, the first part of 1880. For filling in that property I was paid about ten thousand dollars. That was all paid by Mr. Le Roy except one payment, I think, of a hundred dollars or two hundred dollars, that I got before from Mr. Sullivan. I have before me a receipt signed by myself for money paid by Mr. Le Roy in full settlement for my bill for filling in, which receipt is dated July 27, 1880. I finished the work of filling in that tract about a month, it might be, before that receipt—some time about that, as near as I remember. At the time I commenced filling in there were no fences inside of the lines of this tract represented within the blue line on the map, Exhibit "B." There were no fences on it while I was filling it in, nor for two years after I did fill it. I know of the superintendent of streets of the city and county of San Francisco, or some officer of the city and county, entering upon that tract and putting up fences enclosing portions of it after I did that filling in, because they kept their material in my cellar. They commenced that, I think, in February or March, 1882, about two years, I think, after I got through
34 filling in the lot. When I first knew those premises there was nobody in charge of them, except there was a China house on the land. When I went to work there for Mr. Sullivan in 1876 he had it rented to some Chinese.

By Mr. MEREDITH:

Q. 2. Do you know of your own knowledge that Mr. Sullivan rented that to the Chinaman?

A. I seen them paying the rent to him.

By Mr. PILLSBURY:

Q. 3. What was the Chinaman using it for?

A. Raising vegetables. After I commenced to fill in I covered those gardens up. I went into possession under Mr. Sullivan in 1876 to fill them up. I remained there working and in possession under him until Mr. Le Roy bought, and I have remained under Mr. Le Roy in possession from that time to this time. I don't own the land, but I am living on the land under Mr. Le Roy, and I have been living on the land under Mr. Le Roy since Mr. Sullivan sold to Mr. Le Roy as a tenant. Since 1875 nobody has occupied that tract under Mr. Sullivan and Mr. Le Roy except their tenants. I am acquainted with those premises since 1864. From 1865 down to 1875 they were used and occupied for a China garden. Those Chinamen were holding under Mr. Sullivan. There was a ditch along Fourteenth street and around on Harrison street called Center's ditch, to my recollection.

This tract, represented on the map, Exhibit "B," within the blue line, was all in one piece when I commenced grading it in 1876. The whole tract was not all fenced in at that time.

M. COYNE.

It is stipulated by complainant and respondent that on December 3rd, 1870, Benjamin F. Washington, Rodman Gibbons, and L. L. Bullock, as the board of tide-land commissioners of the State of California, made and acknowledged in due form a deed to Eugene L. Sullivan for the expressed consideration of three hundred and fifty-two dollars and eighty cents, by which they purported to sell, alien, remise, release, and quitclaim unto said Sullivan, his heirs and assigns, all the right, title, and interest of the State of California in and to a certain piece of land therein described, being the premises in controversy; which said conveyance was approved by the attorney general of the State of California December 20th, 1870, and
35 also approved on the same day by the State board of examiners, consisting of H. H. Haight, Governor; John W. Bost, surveyor general, and Robert Watt, controller.

Respondent objects to the introduction in evidence of the deed above referred to upon the ground that no title or possession has been shown in the State; and, further, upon the ground that the persons signing said deed had no authority to execute the same.

Respondent admits that the persons purporting to have signed the deed last above referred to constituted the board of tide-land commissioners of the State of California at the time of the date of said deed.

In connection with said deed complainant refers to the act of the Legislature of the State of California of April 1st, 1870, published in the Statutes of 1870, page 541.

Continued, by agreement of counsel, to Friday, January 2, 1885, at one o'clock p. m.

FRIDAY, *January* 2, 1885—1 o'clock p. m.

Present: Mr. Pillsbury, of counsel for complainant; Mr. Meredith, of counsel for respondent.

Deposition of William J. Shaw.

Examination-in-chief of WILLIAM J. SHAW on behalf of complainant by Mr. PILLSBURY:

Q. 1. State your name and place of residence, and what, if anything, you know with reference to that portion of the tract described in a certain deed made by John W. Kisling and wife, September 12, 1859, to William J. Shaw, east of Harrison street and southwest of Eleventh street, in the city and county of San Francisco.

A. My name is William J. Shaw, and I live in San Francisco. I have had my residence in this city and county for over thirty years. I am the William J. Shaw mentioned in the deed referred to. Soon after the date of that deed, I think within a year or so, I conveyed those premises to Mr. E. L. Sullivan, of this city. From the
36 time of the conveyance of those premises to me until I sold to Sullivan I had nominal possession, the same as anybody has who has a grant of premises. I never had a house on the land

or lived on it. I don't think it was separately enclosed. It was in the undisputed possession of John W. Kisling when I bought it, and it was deemed to be in my undisputed possession up to the time I sold it. There was not, to my knowledge, any question raised as to my possession by intrusion or invasion of the premises by anybody from the date of the Kisling deed to me until I sold to Sullivan. I made no use of the land. I am the William J. Shaw who conveyed to Eugene L. Sullivan for the expressed consideration of twenty-six thousand dollars the portion of the premises acquired by me from Kisling, bounded on the northerly side by Eleventh street, on the westerly side by Harrison street, on the southwesterly side by Fourteenth street, and on the south and easterly side by Mission creek, together with other adjoining property. I presume the date of that deed, as now stated to me—December 13, 1861—is correct.

Complainant introduces in evidence a drawing of a section of the Van Ness ordinance map, showing the premises in controversy and their surroundings, marked "Complainant's Exhibit C."

It is admitted by both complainant and respondent that the drawing, Exhibit "C," is correct, subject to correction if found to be erroneous.

Respondent refers as evidence to the Van Ness ordinance as it appears in the official publication of the Statutes of California of 1858, pages 52 *et seq.*

It is agreed by both complainant and respondent that the said ordinance, as published in said volume, is correct.

Q. 2. Do you know whether this tract in question was within any of the exceptions or reservations mentioned in the Van Ness ordinance?

A. I don't know. It was not, to my knowledge. The premises lie within the charter line of 1851 of the city of San Francisco. It has always been considered that the city and county of San Francisco succeeded to the municipality known as the city of San Francisco.

It is admitted by both complainant and respondent that the premises in controversy in this suit are included within what are known as the "pueblo lands" of San Francisco, and that
37 they are not nor is any part of them within any reservation for military purposes, nor for previous Spanish or Mexican grants.

Q. 3. I will ask you to state what you know about this land being within any reservation.

Objected to by respondent as incompetent—not the best evidence.

A. All I can say is that it is not within any reservation that I am aware of. No objection of that sort was raised when I purchased nor when I sold. I don't know but what I ought to state here that when Mr. Hoff (I think that was his name), city surveyor, made the Van Ness map he laid out a wide street and proposed to

cut up that property. I think it crossed Harrison street, according to my recollection. The owners of property affected by it above the creek made strenuous objections to that street being opened, and it never was opened, so far as I know, during my ownership of that property or before the time I purchased it. I don't know of any street crossing the creek and running through that property. The Potrero was on the opposite side of the creek from this property—tne southeasterly side. I never knew of any street corresponding with what is indicated by the green line on the map, Exhibit "B," and marked "Old Channel St.," being laid out on the property. During the time of my acquaintance with the property, when I bought it and when I sold it, there was no street ever laid out through that property that was opened, that I knew of or ever heard of. While I knew that property I never knew any portion of it to be used for any public use, referring to that portion east of Harrison street.

I am the William J. Shaw mentioned in the judgment-roll, Exhibit "A," and I was plaintiff in that suit.

W. J. SHAW.

Continued, by agreement of consel, to Friday, 9th instant, at two o'clock p. m.

38 FRIDAY, *January* 9, 1885.

Further continued, by agreement of counsel, to Friday, 23rd instant, at two o'clock p. m.

FRIDAY, *January* 23, 1885.

Present: Mr. Pillsbury, of counsel for complainant; Mr. Bugbee, of counsel for respondent.

Deposition of William H. Grattan.

Examination-in-chief of WILLIAM H. GRATTAN on behalf of complainant by Mr. PILLSBURY:

Q. 1. State your name, age, place of residence, and occupation, and what, if anything, you know with relation to the tract of land represented on the map, Exhibit B, within the blue lines.

A. William H. Grattan; sixty-two years; San Francisco; assistant United States appraiser. From 1860 or 1861 to 1876 I had charge of the real estate of E. L. Sullivan in this city and county. With reference to the premises in question represented within the blue line on the map, Exhibit B, and which includes the premises derived by Mr. Sullivan under the Shaw and Kisling title, and also the premises derived by him from Parsons, Lee, and Felton under the Thorne and Center and Stuart title, I remember Mr. Sullivan's purchase of those premises in about the years 1860 or 1861. From that time up to the thirty-first day of October, 1876, I was agent for Mr. Sullivan in the management of that property. I had charge of the premises, collecting rents and so forth. At the time that property was acquired by Mr. Sullivan upon it was a hill of sand. I had it

graded—cut down to the level—and leased it out as a Chinese vegetable garden for most of the time within the period referred to. It was occupied as a Chinese garden all the time from about 1863 until the time of the sale by Sullivan to Le Roy, October 31st, 1876, and there were some few house lots leased on the same property at and near the corner of Eleventh street. Mr. Sullivan had a continuous picket fence along the entire Harrison-street front of the property, and from the corner of Eleventh and Harrison along Eleventh street he had a continuous line of fencing extending to the northeasterly corner of the fifty-vara lot, which is not included
39 within the blue line on the map, Exhibit B, and from the southeasterly corner of that fifty-vara lot he had a continuous fence which extended to and into the mud of the creek. As to the fencing along the southern end of the premises referred to, I do not recollect. The whole premises were enclosed. The people who were in possession of the property were Chinese tenants and laborers around there, who leased the lands from Mr. Sullivan and put up their cottages. They were all tenants of Mr. Sullivan. I remember perfectly well the circumstance of the sale by Mr. Sullivan to Theodore Le Roy. I have known nothing about the premises since that time. During the period mentioned, from 1860 or 1861 to October, 1876, there were no streets crossing these premises referred to.

I may possibly know Michael Coyne. I don't remember the man. I remember a contract having been made by Mr. Sullivan with some party for filling in a portion of the property. A portion of Harrison street was filled in to conform to the official grade, and a portion of this property was filled in also.

W. H. GRATTAN.

Deposition of Michael Hayes.

Examination-in-chief of MICHAEL HAYES on behalf of complainant by Mr. PILLSBURY:

Q. 1. State your name, age, place of residence, and occupation, and what, if anything, you know with relation to the premises in controversy, represented on the map, Exhibit B, within the blue line.

A. Michael Hayes; fifty-three years; San Francisco. I am engaged in no business at present. I was one of the Commissioners under the so-called Van Ness ordinance. I am the Michael Hayes who signed the report and map that was made pursuant to that ordinance and which is known as the Van Ness ordinance map. I am familiar with every foot of the premises referred to. I knew John Kisling in his lifetime. I also knew John Center, Isaac N. Thorne, and Charles V. Stuart. I knew Kisling in July, 1849, and from that time to the time of his death. I first knew Isaac N. Thorne, Charles V. Stuart, and John Center in December,
40 1850, and have known them ever since. Kisling lived upon and owned a tract the southern boundary of which was the northern boundary line of land owned and occupied by Thorne and Center. That line would be near the northern line of Fourteenth

street if extended eastwardly across the blue lines on the map, Exhibit B. Kisling had that land enclosed, or nearly all enclosed. In one place he had a garden. Then afterwards they made a ditch—who made it I don't know; I think it was Center or Thorne—and then they put a fence up. That was before the passage of the Van Ness ordinance. I know nothing about the sale by Kisling to Shaw. I know that Kisling was in possession there in 1855 and 1856, because he contributed money to have the survey made of the Van Ness ordinance map. Kisling was in absolute possession there in 1855 or 1856 of nearly a hundred acres. He was in absolute possession in 1855 and 1856 of the premises east of Harrison street, represented on the map, Exhibit B. I know of the possession of Thorne and Center and Stuart below Kisling, because they joined him there. They had a ditch between to keep Kisling's cattle out. Center, Thorne, and Stuart had a vegetable garden, and Kisling's cows would jump through, and they made a ditch along there and put some boards up to keep the cattle out. That made a division line between them, on about the northern line of Fourteenth street extended. I know that Center, Thorne, and Stuart had possession of that property in 1850, and from that time on continuously until subsequent to 1860. There never was a dispute about that particular ground. Parties were squatting all about there, but there was never any difficulty in relation to the possession of those premises of Kisling and Thorne and Center and Stuart represented on the map, Exhibit B, inside of the blue line.

I recognize the map, Exhibit C, as a correct copy of that portion of the Van Ness ordinance map covering these premises in question and their surroundings, because I went yesterday and examined the original map, to which my signature is attached. As I have stated, I was one of the commissioners under whom that map was made and I am familiar with the premises.

Q. 2. State whether these premises referred to or any part of them come within the exceptions or reservations mentioned in the Van Ness ordinance.

41 (Objected to by respondent as incompetent—not the best evidence.)

A. They do not nor does any part of them; they do not include any school lots, engine lots, hospital lots, or property dedicated to street purposes or public squares.

Q. 3. Were they or was any part of them within any reservation for military or other purposes of the Government of the United States?

(The same objection by respondent.)

A. No, sir; they were not.

Q. 4. State, if you know, whether there was on the Van Ness ordinance map any street laid down across these premises referred to.

(The same objection by respondent.)

A. There was not.

Q. 5. Look at the map, Exhibit B, and particularly at the portion marked "Old Channel St.," within the green line, and state if there was on the Van Ness ordinance map any street corresponding to that.

(Objected to by respondent as incompetent—not the best evidence.)

A. There was not.

Q. 6. Was there on the Van Ness ordinance map any street corresponding with Alameda street, as represented on the map, Exhibit B, which ran through these premises?

(The same objection by respondent.)

A. There was not; it stopped at Mission creek—did not cross it.

Q. 7. And how with regard to what is laid down on the map, Exhibit B, as Columbia street?

(Same objection by respondent.)

A. Columbia street stopped at Mission creek and did not cross it. On the Van Ness ordinance map no portion of Columbia street was laid out upon the premises in controversy. The Van Ness ordinance map was made in 1855 and 1856. It was commenced in the fall of 1855 and finished in the spring of 1856.

I was familiar with Mission creek when Kisling lived on those premises referred to. He had a brick-yard on the premises; he had also a vegetable garden; he also kept cattle on the premises. He had a portion of it enclosed in 1849; not all. I think in 1850 he
42 enclosed nearly the whole tract. He had a boat landing or embarcadero on the premises referred to upon the edge of the creek. That landing was used for people who lived in the Mission to land lumber, groceries, and other material which was brought from the city by boats instead of being brought out by wagons, and it was also used as a landing place for boats in which Kisling sent his bricks to the city; also the boats of vessels came there to get fresh water from the premises. The portion of the city to the south and east of Mission creek there was what was called the Potrero.

Q. 8. State, if you know, whether or not the streets of the Potrero as laid down on this Van Ness ordinance map stopped at the creek and in no case extended across the creek to the northern and westerly sides.

(Objected to by respondent as incompetent—not the best evidence.)

A. None of the streets extended across the creek upon these premises in controversy; they stopped at the eastern and southern bank of the creek.

Q. 9. State, if you know, whether or not these premises in question were inside of the limits of the Van Ness ordinance map.

(The same objection by respondent.)

A. They were.

It is stipulated and agreed by and between counsel for the respective parties in this cause that the act of the Legislature of the State of California appearing in the official publication of the Statutes of 1858, pages 52 to 56, both inclusive, shall be considered in evidence, and that the copies of the ordinance therein set out are correct.

It is further in like manner stipulated and agreed that the act of Congress of July 1st, 1864, appearing in the official publication of the United States Statutes at Large, volume 13, pages 332 to 334, both inclusive, may be considered as in evidence.

It is further and in like manner stipulated and agreed that the decree of the United States circuit court for the district of California made May 18, 1865, confirming the pueblo lands to the city and county of San Francisco shall be considered as in evidence.

The WITNESS: I know that Kisling claimed to the centre of the creek. I helped survey his claim for him in 1849. I think
43 the creek was about one hundred feet wide about opposite Kisling's house when I first knew it. I was out there two or three months ago, and there is no creek at all there now; it is all filled in there and for several blocks above and below; the creek had disappeared.

MICHAEL HAYES.

Deposition of Isaac N. Thorne.

Re-examination of ISAAC N. THORNE on behalf of complainant by Mr. PILLSBURY:

Q. 1. Referring to the description in the deed of Kisling and wife to Shaw, dated September 12, 1859, heretofore introduced in evidence and which description I have just read to you, I will ask you to state whether the land described in that deed includes the premises in question to the north of the north line of Fourteenth street prolonged eastwardly across the blue lines and within the blue line, as represented on the Exhibit B?

A. That description embraces the tract of land in controversy north of the north line of Fourteenth street prolonged eastwardly. The line referred to in the pre-emption claim of John W. Kisling heretofore introduced in evidence covers the same premises. The premises described in the deed of John Center and Isaac N. Thorne to Charles V. Stuart, dated July 15, 1854, and heretofore introduced in evidence, includes the premises represented within the blue line and south of the north line of Fourteenth street produced eastwardly across the blue lines, as represented on said map, Exhibit B.

I. N. THORNE.

Complainant agrees that the patent from the United States to the city and county of San Francisco for the pueblo lands issued since the commencement of this suit may be introduced and received in evidence with the same force and effect as though it had been pleaded by respondent in a supplemental answer.

The said patent is considered as in evidence by agreement of both complainant and respondent.

44 It is stipulated and agreed by and between counsel for both complainant and respondent that all statutes of the State of California and of the United States affecting the pueblo lands of San Francisco may be referred to in the consideration of this case with the same force and effect as though formally introduced in evidence.

It is in like manner stipulated and agreed that the time within which testimony may be taken herein is extended to and including Saturday, 31st instant.

Complainant rests.

Examiner's Certificate.

I certify that the foregoing depositions were taken at the times and at the place in the above record and in the caption thereof set forth and in the presence of counsel for the respective parties to the cause in said caption entitled; that previous to giving his deposition each of the witnesses in said record named was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in said cause; that said depositions were taken down in writing by me and were read to and signed by the said witnesses, respectively, and that I have retained said depositions for the purpose of transmitting the same to the court for which they were taken.

I further certify that I am not attorney nor of counsel for either of the parties to said cause nor in any way interested in the event thereof.

In testimony whereof I have hereunto set my hand this 25th day of February, 1885.

S. C. HOUGHTON,
Examiner, &c.

Endorsed: Filed Feb. 25, 1885. L. S. B. Sawyer, clerk.

45 EXHIBIT A.

District Court, 12th Judicial District.

WILLIAM J. SHAW, Plaintiff,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Defendant.

CITY AND COUNTY OF SAN FRANCISCO, *ss:*

The above-named plaintiff complains of the above-named defendant, and for cause of action shows—

That the above-named plaintiff is the owner in fee simple absolute and is in the actual possession of the following-described lands and premises and in connection with the person from whom he acquired the same has been and continued in the actual possession of the same for the period of fourteen years, namely: All of that lot

of ground bounded by Johnson street, Bryant street, Thorne street, and Brannan street extended from Johnston to Thorne street; also all that piece of ground bounded as follows: Beginning at the intersection of Tracy street and Mission creek and running thence along Mission creek to Wood street; thence along Wood street to Harrison street; thence along Harrison street to Brown street; thence along Brown street to Folsom street; thence along Folsom street three hundred and sixty feet, more or less, to a private street called ——, being nearly on a line with Ellen street; thence easterly along said private street or the northerly line of Ellen street extended to Harrison two hundred and seventy-five feet; thence southerly and parallel to Folsom street three hundred and fifty feet, more or less, to a point on the northerly line of Tracy street two hundred and seventy-five feet easterly from the easterly line of Folsom street, and thence along Tracy street to the point of beginning; also a lot on the east corner of Wood and Howard streets, being part of block No. 7 and bounded as follows: Beginning on said corner and running thence northerly along the easterly line of Howard St. one hundred and forty-five feet; thence at right angles easterly
46 and parallel to Wood street one hundred feet; thence at right angles and parallel to Howard street northerly sixty feet to the line half way between the northerly line of Wood and the southerly line of Thorne streets; thence at right angles easterly and parallel to Wood street one hundred feet; thence at right angles southerly and parallel to Howard street two hundred and five feet, more or less, to the northerly line of Wood street, and thence along Wood street to the said point of beginning.

Also a lot on the west corner of Harrison and Wood streets, being part of block No. 8 and bounded as follows: Beginning at said corner and running thence along Wood street towards Folsom street two hundred and twenty-five feet; thence at right angles northerly two hundred and five feet; thence at right angles easterly and parallel to Wood St. eighty-seven and a half feet to the westerly line of a school lot (intended to be conveyed by the plaintiff to the defendant for public purposes); thence at right angles southerly and parallel to Harrison street sixty-eight feet and nine inches; thence at right angles easterly one hundred — thirty-seven and one-half (137½) feet to Harrison St., and thence southerly along the westerly line of Harrison St. sixty-seven and one-half feet to the said corner of Harrison and Wood street to the point of beginning.

That the plaintiff is informed and believes and charges the truth to be that the defendant (aforesaid) claims some title, estate, and interest in said lands and premises above described adverse — the said plaintiff, the precise nature of which the plaintiff is ignorant of, but which operates as a cloud on the title of the plaintiff.

Wherefore the plaintiff prays that such claim of the defendants may be determined in this action, and that by the judgment of this court the title of the plaintiff may be established and decided valid, and that it may be decided that said defendant has no title, claim,

or interest in the said lots, and for such other and further relief as may be agreeable to equity and good conscience.

WM. J. SHAW, *In Pro. Per.*

47 STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Wm. J. Shaw, being duly sworn, says that he is the plaintiff in the foregoing action, and that he has read the aforesaid complaint therein and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters that he believes it is true.

WM. J. SHAW.

Subscribed and sworn to before me this 28th day of March, A. D. 1861.

BEVERLY C. DUER,
Deputy County Clerk.

Endorsed: Filed March 28th, 1861. Washington Bartlett, cl'k, by Beverly C. Duer, D. C.

48 In the District Court of the Twelfth Judicial District of the State of California in and for the City and County of San Francisco.

WILLIAM J. SHAW, Plaintiff,
vs.
THE CITY AND COUNTY OF SAN FRANCISCO, Defendant. }

Action brought in the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco and the complaint filed in said city and county of San Francisco in the office of the clerk of said district court.

The People of the State of California send greeting to The City and County of San Francisco, defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the twelfth judicial district of the State of California in and for the city and county of San Francisco and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within this county, or, if served out of this county but in this district, within twenty days; otherwise within forty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to determine the claim of defendant to certain lands and premises particularly described in the complaint herein and to obtain a judgment of this court establishing the title of plaintiff to said premises and deciding it to be valid and deciding that said defendant has no title, claim, or interest in the said lots and premises and for general relief.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the complaint.

Given under my hand and seal of the district court of the twelfth judicial district of the State of California in and for the [SEAL.] city and county of San Francisco this 28th day of March, in the year of our Lord one thousand eight hundred and sixty-one.

WASHINGTON BARTLETT, *Clerk*,
By BEVERLY C. DUER, *Deputy Clerk*.

49 OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the within summons on the 2nd day of April, A. D. 1861, and personally served the same on the 2nd day of April, A. D. 1861, upon the within defendant, The City and County of San Francisco, by delivering to H. F. Teschemacher, president of the board of supervisors of said defendant personally, in the city and county of San Francisco, a copy of said summons attached to a certified copy of the complaint in said action therein named.

Dated at San Francisco this 2nd day of April, 1861.

CHARLES DOANE, *Sheriff*,
By JOHN A. CLARK,
Deputy Sheriff.

Filed April 5th, 1861.

WASHINGTON BARTLETT, *Clerk*,
By WM. R. SATTERLEE,
Deputy Clerk.

In the District Court of the Fourth Judicial District in and for the City and County of San Francisco.

WM. J. SHAW
vs.
THE CITY AND COUNTY OF SAN FRANCISCO.

And now comes the defendant, The City and County of San Francisco, and for answer to the complaint on file in the above-entitled cause say that they had not at the time of the commencement of this action nor have they now nor do they claim or pretend to have any right, title, estate, or interest of, in, or to the premises described in the complaint or any part thereof, and these defendants
50 hereby disclaim all right, title, and interest of, in, and to said premises and every part thereof, and consent — the plaintiff take judgment herein in accordance with the prayer of the complaint, but without costs.

S. W. HOLLADAY,
Att'y for Def't.

Ap'l 12, '61.

Endorsed: Filed April 13, 1861. W. Bartlett, cl'k, by Wm. R. Satterlee, D. C.

In the District Court of the Twelfth Judicial District of the State of California in and for the City and County of San Francisco.

WILLIAM J. SHAW
vs.
THE CITY AND COUNTY OF SAN FRANCISCO. } No. 8597. May 13, A. D. 1861.

This cause having been brought on to be heard upon the complaint taken as confessed and the disclaimer of the defendant, and it appearing therefrom to the court that at the time of the commencement of this action the said plaintiff was in the actual possession of the lands and premises hereinafter described, the plaintiff, William J. Shaw, claiming to hold the same as the owner in fee simple thereof, and that the defendant disclaims any interest or estate in said premises in and by their said answer:

Now, therefore, on motion of Wm. J. Shaw, plaintiff, in person, no one appearing to oppose, it is ordered, adjudged, and decreed, and this court, by virtue of the authority therein vested, doth order, adjudge, and decree, that the pretended claim of the defendant of, in, and to the premises hereinafter described and every part thereof is invalid and void, and the title of the said premises is good,
51 valid, and sufficient as against the said defendant and against all and every person or persons whomsoever claiming or to claim the same by, through, or under said defendant since the commencement of this action.

And it is further ordered, adjudged, and decreed that the said defendants and all persons claiming by, through, or under them be forever barred and restrained from claiming or asserting any estate, title, or interest of, in, or to the premises hereinafter described or to any part thereof adverse to the title of the said plaintiff.

The description and particular boundaries of said premises are as follows: All that lot of ground bounded by 10th or Johnston street, Bryant street, 11th or Thorne street, and Brannan street extended from 9th or Johnston to 10th or Thorne street; also all that piece of ground bounded as follows: Beginning at the intersection of 14th or Tracy street and Mission creek, and running thence along Mission creek to 11th or Wood street; thence along 11th or Wood street to Harrison street; thence along Harrison street to 12th or Brown street; thence along 12th or Brown street to Folsom street; thence along Folsom street three hundred and sixty feet, more or less, to a private street called East 13th street, being nearly on a line with 13th or Ellen street; thence easterly along said private street or the northerly line of 13th or Ellen street extended to Harrison two hundred and seventy-five feet; thence southerly and parallel to Folsom street three hundred and fifty feet, more or less, to a point on the northerly line of 14th or Tracy street two hundred and seventy-five feet easterly from the easterly line of Folsom street, and thence along 14th or Tracy street to the place of beginning.

Also a lot on the east corner of 11th or Wood and Howard streets, being part of block No. 7, and bounded as follows: Beginning on said corner and running thence northerly along the easterly line of Howard street one hundred and forty-five feet; thence at right angles easterly and parallel to 11th or Wood street one hundred feet; thence at right angles and parallel to Howard street northerly sixty feet to the line half way between the northerly line of 11th or Wood and southerly line of 10th or Thorne street; thence at right angles easterly and parallel to 11th or Wood street one
52 hundred feet; thence at right angles southerly and parallel to Howard street two hundred and five feet, more or less, to the northerly line of 11th or Wood street, and thence along 11th or Wood street to the said point of beginning; also a lot on the west corner of Harrison and 11th or Wood streets, being part of block No. 8, and bounded as follows: Beginning at said corner and running thence along 11th or Wood street towards Folsom street two hundred and twenty-five feet; thence at right angles northerly two hundred and five feet; thence at right angles easterly and parallel to 11th or Wood St. eighty-seven and a half feet to the westerly line of a school lot (intended to be conveyed by the plaintiff to the defendant for public purposes); thence at right angles southerly and parallel to Harrison street sixty-eight feet and nine inches; thence at right angles easterly one hundred and thirty-seven and one-half (137½) feet to Harrison St., and thence southerly along the westerly line of Harrison St. sixty-seven and one-half feet to the said corner of Harrison and 11th or Wood streets, the point of beginning.

A. CAMPBELL,
Judge 12th Dist.

Endorsed: Filed May 13th, 1861. W. Barrett, clerk, by S. L. Supton, D. C.

In the District Court of the Twelfth Judicial District of the State of California in and for the City and County of San Francisco.

WILLIAM J. SHAW
vs.
THE CITY AND COUNTY OF SAN FRANCISCO. } No. 8597. May 13, A. D. 1861.

This cause having been brought on to be heard upon the complaint taken as confessed and the disclaimer of the defendant, and it appearing therefrom to the court that at the time of the
53 commencement of this action the said plaintiff was in the actual possession of the land and premises hereinafter described, the plaintiff, William J. Shaw, claiming to hold the same as the owner in fee simple thereof, and that the defendant disclaimed any interest or estate in said premises in and by their said answer: Now, therefore, on motion of Wm. J. Shaw, plaintiff in person, no one appearing to oppose, it is ordered, adjudged, and decreed and this court by virtue of the authority therein vested doth order, adjudge, and decree that the pretended claim of the defendant of, in, and to the premises hereinafter described and every part thereof

is invalid and void, and the title of the said plaintiff in and to said premises is good, valid, and sufficient as against the said defendant and against all and every person or persons whomsoever claiming or to claim the same by, through, or under said defendant since the commencement of this action.

And it is further ordered, adjudged, and decreed that the said defendants and all persons claiming by, through, or under them be forever barred and restrained from claiming or asserting any estate, title, or interest of, in, or to the premises hereinafter described or to any part thereof adverse to the title of the said plaintiff.

The description and particular boundaries of said premises are as follows: All that lot of ground bounded by 10th or Johnston street, Bryant, 11th, or Thorne street, and Brannan street extended from 9th or Johnston to 11th or Thorne street; also all that piece of ground bounded as follows: Beginning at the intersection of 14th or Tracy street and Mission creek and running thence along Mission creek to 11th or Wood street; thence along 11th or Wood street to Harrison street; thence along Harrison street to 12th or Brown street; thence along 12th or Brown street to Folsom street; thence along Folsom street three hundred and sixty feet, more or less, to a private street called East 13th street, being nearly on a line with 13th or Ellen street; thence easterly along said private street or the northerly line of 13th or Ellen street extended to Harrison two hundred and seventy-five feet; thence southerly and parallel to Folsom street three hundred and fifty feet, more or less, to a point on the northerly line of 14th or Tracy street two hun-
54 dred and seventy-five feet easterly from the easterly line of Folsom street, and thence along 14th or Tracy street to the place of beginning.

Also a lot on the east corner of 11th or Wood and Howard streets, being part of block No. 7, and bounded as follows: Beginning on said corner and running thence northerly along the easterly line of Howard street one hundred and forty-five feet; thence at right angles easterly and parallel to 11th or Wood street one hundred feet; thence at right angles and parallel to Howard street northerly sixty feet to the line half way between the northerly line of 11th or Wood and the southerly line of 10th or Thorne street; thence at right angles easterly and parallel to 11th or Wood street one hundred feet; thence at right angles southerly and parallel to Howard street two hundred and five feet, more or less, to the northerly line of 11th or Wood street, and thence along 11th or Wood street to the said point of beginning; also a lot on the west corner of Harrison and 11th or Wood streets, being part of block No. 8, and bounded as follows: Beginning at said corner and running thence along 11th or Wood street towards Folsom street two hundred and twenty-five feet; thence at right angles northerly two hundred and five feet; thence at right angles easterly and parallel to 11th or Wood St. eighty-seven and a half feet to the westerly line of a school lot (intended to be conveyed by the plaintiff to the defendant for public purposes); thence at right angles southerly and parallel to Harrison street sixty-eight feet and nine inches;

thence at right angles easterly one hundred and thirty-seven and one-half (137½) feet to Harrison St., and thence southerly along the westerly line of Harrison St. sixty-seven and one-half feet to the said corner of Harrison and 11th or Wood streets, the point of beginning.

Decree entered May 13th, A. D. 1861.

368.

55 District Court of the Twelfth Judicial District of the State of California in and for the City and County of San Francisco.

CITY AND COUNTY OF SAN FRANCISCO, *ss*:

WM. J. SHAW
vs.
THE CITY AND COUNTY OF SAN FRAN'CO.

I, W. Bartlett, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the district court of the twelfth judicial district thereof, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause and recorded in Judgment Book D of said court, — constitute the judgment-roll in said case.

Witness my hand and the seal of said district court this 13th day of May, A. D. 1861.

[SEAL.] WASHINGTON BARTLETT, *Clerk*,
By B. C. DUER, *Deputy Clerk*.

I, William T. Sesnon, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court in and for said city and county, hereby certify the foregoing to be a full, true, and correct copy of the original judgment-roll in the above-entitled cause, filed in my office on the 13th day of May, A. D. 1861.

Attest my hand and seal of said court this 29th day of November, A. D. 1884.

[SEAL.] WILLIAM T. SESNON, *Clerk*,
By J. STEPPACHER, *Deputy Clerk*.

Endorsed: Judgment-roll. Filed this 13th day of May, A. D. 1861. Washington Bartlett, clerk, by B. C. Duer, deputy clerk. U. S. circuit court, Cal. Le Roy *v.* San Francisco. No. 3145. Complainants' Exhibit A. S. C. H., ex'r. Filed Feb. 25, 1885. L. S. B. Sawyer, clerk.

56 *Affidavit of Value.*

In the United States Circuit Court, Ninth Circuit, District of California. In Equity.

VICTOR LE ROY, EUGENE LE ROY, and GEORGES LE ROY
vs.
THE CITY AND COUNTY OF SAN FRANCISCO.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

John T. Humphreys, assistant city and county attorney of San Francisco, being first duly sworn, deposes and says that the land described in the decree and in controversy in above-entitled action exceeds in value the sum of $5,000.

JOHN T. HUMPHREYS.

Subscribed and sworn to before me this 17th day of October, A. D. 1888.

L. S. B. SAWYER,
Com'r U. S. Cir. Court, Nor. Dist. Cal.

Endorsed: Filed Oct. 17, 1888. L. S. B. Sawyer, clerk.

(Here follow drawings marked pp. 57 & 58.)

59 At a stated term, to wit, the July term, A. D. 1888, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Wednesday, the 17th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Allowing Appeal.

VICTOR LE ROY *et al.*
vs.
CITY AND COUNTY OF SAN FRANCISCO. } No. 3145.

On motion of J. T. Humphries, Esq., of counsel for respondent, and George Flourney, Jr., Esq., attorney and counsellor for the city and county of San Francisco and solicitor for said respondent, it is ordered that an appeal to the Supreme Court of the United States from the decree filed and entered herein be, and the same hereby is, allowed, and that a transcript of the record, stipulations, depositions, and all proceedings herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the amount of the bond on appeal be fixed at five hundred dollars.

60 *Bond on Appeal.*

In the Supreme Court of the United States.

THE CITY AND COUNTY OF SAN FRANCISCO, Appellant,
vs.
EUGENE LE ROY, GEORGES LE ROY, and RENÉ DE TOCQUEVILLE, Appellees. } No. 3145.

Know all men by these presents that we, The City and County of San Francisco, by E. B. Pond, mayor, as principal, and Henry Pilster and D. Barry, as sureties, are held and firmly bound unto Eugene Le Roy, Georges Le Roy, and René de Tocqueville, the above-named appellees, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Eugene Le Roy, Georges Le Roy, and René de Tocqueville, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Dated this 5th day of June, A. D. 1889.

The condition of the above obligation is such that whereas said City and County of San Francisco has taken an appeal to the Supreme Court of the United States to reverse the decree heretofore filed and entered by the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, in the cause entitled Eugene Le Roy, Georges Le Roy, and René de Tocqueville against The City and County of San Francisco, No. 3145, which said decree was filed and entered of record in said circuit court on the 14th day of June, A. D. 1887:

Now, therefore, if the above-named City and County of San Francisco shall prosecute its said appeal to affect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

61 CITY AND COUNTY OF SAN FRANCISCO,
By E. B. POND, *Mayor*. [SEAL.]
HENRY PILSTER. [SEAL.]
D. BARRY. [SEAL.]

Signed, sealed, and delivered in presence of—

____ ____.

[Seal of the City and County of San Francisco.]

UNITED STATES OF AMERICA,
Northern District of California, } *ss:*

Henry Pilster and D. Barry, being duly sworn, each for himself deposes and says that he is a householder with- said northern district of California, and that he is worth the sum of five hundred

dollars, exclusive of property exempt from execution and over and above his just debts and liabilities.

HENRY PILSTER.
D. BARRY.

Subscribed and sworn to before me this 5th day of June, A. D. 1889.

L. S. B. SAWYER,
Com'r U. S. Cir't Court, Nor. Dist. Cal.

Endorsed: The form of the within bond and the sufficiency of the sureties thereon are hereby approved. Sawyer, circuit judge. Filed June 5, 1889. L. S. B. Sawyer, clerk.

62 I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit in and for the northern district of California, do hereby certify that the foregoing sixty-one traced and written or printed pages, numbered from 1 to 61, inclusive, are a full, true, and correct copy of the record and of all proceedings in the suit entitled Eugene Le Roy, Georges Le Roy, and René de Tocqueville, complainants and appellees, *vs.* The City and County of San Francisco, respondent and appellant, No. 3145, and that the same together constitute the transcript on appeal to the Supreme Court of the United States.

Attest my hand and the seal of said circuit court this 19th day of September, A. D. 1889.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER, *Clerk.*

63 UNITED STATES OF AMERICA, *ss:*

To Eugene Le Roy, Georges Le Roy, and René de Tocqueville, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 14th day of October, A. D. 1889, pursuant to an order allowing an appeal from the decree filed and entered on the 14th day of June, A. D. 1887, by the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, in a suit wherein The City and County of San Francisco is respondent and appellant and you are complainants and appellees, to show cause, if any there be, why the decree in the said order mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, this 6th day of June, A. D. 1889, and of the Independence of the United States the one hundred and thirteenth.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

64 [Endorsed:] No. 3145. In the Supreme Court of the United States. The City and County of San Francisco, appellant, *vs.* Eugene Le Roy *et al.*, appellees. Citation. Filed June 11, 1889. L. S. B. Sawyer, clerk.

SAN FRANCISCO, CALIFORNIA.

Receipt of a copy of the within citation is hereby admitted and acknowledged this 11th day of June, 1889.

PILLSBURY & BLANDING,
Solicitors for All of the Complainants and Appellees Named in the Within Citation.

Endorsed on cover: N. California C. C. U. S. No. 1266. The City and County of San Francisco, appellant, *vs.* Eugene Le Roy, Georges Le Roy, and René de Tocqueville. Filed October 1st, 1889.

Supreme Court, U.S.
FILED,
DEC 24 1890
JAMES H. McKENNEY,
CLERK

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

THE CITY AND COUNTY OF SAN FRANCISCO,
PLAINTIFF IN ERROR,

vs.

EUGENE LE ROY, GEORGE LE ROY AND RENE
DE TOCQUEVILLE, DEFENDANTS
IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT, NINTH JUDICIAL DISTRICT, AND DISTRICT OF CALIFORNIA.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

THE CITY AND COUNTY OF SAN FRANCISCO, PLAINTIFF IN ERROR,

vs.

EUGENE LE ROY, GEORGE LE ROY AND RENE DE TOCQUEVILLE, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT, NINTH JUDICIAL DISTRICT, AND DISTRICT OF CALIFORNIA.

Brief of Plaintiff in Error.

ABSTRACT OF STATEMENT.

This is an action instituted by Victor Le Roy, Eugene Le Roy and George Le Roy in the United States Circuit Court, District of California, in equity, to quiet title to the lands described in the complaint, situated in the City and County of San Francisco.

In the complaint, complainants after alleging ownership in fee simple absolute, of the lands described, and that defendant set up some claim of title to the same adversely to their title, which claim they state is without right and unfounded, allege that they (plaintiffs) deraign title to all but a small portion of the said real property, from one William J. Shaw, who they aver on the 10th day of February, 1862, in the District Court of the 12th Judicial District in and for the City and County of San Francisco, in an action then pending in that Court, to quiet his title to certain lands in controversy in that action, recovered

a judgment and decree against said City and County, decreeing that the title of said Shaw to the premises was "good and valid" and that the claim of title of the defendant to the same, was invalid and void; that the real estate in controversy in that action, being described in the complaint in this action, includes all but a small portion of the lands claimed by plaintiff herein—and they also allege, that by the judgment and decree in the action of Shaw *vs.* this defendant, the defendant is estopped from asserting any right, title or interest to the lands described therein.

The defendant, by its answer, denied the alleged ownership of plaintiffs to the property described, denied that plaintiff deraigned their alleged title from said Shaw, or that said Shaw ever commenced any action against the defendant to quiet his title to any part of the premises in controversy—or that any Court ever made or entered the alleged judgment in favor of said Shaw.

It also alleged that the defendant was then, and for more than ten years next before that time, had been continuously, the owner seized in fee simple absolute and possessed of the said real property.

Also that neither the plaintiff nor their predecessors, or grantors were, nor any of them was, seized or possessed of any part of said real estate within five years before the commencement of this action; but that defendant during all that time was in the possession of the same.

To the answer plaintiffs filed their general replication and the issues were those made by the pleadings above mentioned (Record pp., 1-6, Fols., 1-9).

After the case was at issue and after the taking of the testimony, Victor Le Roy died; and it then being shown to the Court, that on his death, all his right, title and interest in the premises in controversy, passed to Rene de Tocqueville, a citizen of France, an order was made substituting said Rene de Tocqueville, as a party plaintiff in the action, in the place and stead of said Victor Le Roy, deceased, (Record pp., 8, 9, 10, Fols., 12 to 15).

These facts (I understand) are admitted.

That the map inserted in the Record between pages 40 and 41, marked Exhibit "B" correctly shows the land claimed by plaintiff in this action, enclosed within boundaries designated by blue lines; that the tract enclosed within red or pink lines upon that exhibit represents, what is termed the original Shaw claim—provided that claim extended only to the westerly line of Mission Creek; that if the claim extended to the center of that creek, then, it extended to the blue line shown on that map to the right of the red or pink line; that the portion of the premises represented on that map within green lines, and marked "old Channel street" is, so far as the same is included in the tract, delineated by blue lines, the land in controversy in this action. (Stipulation Record page 12.)

That at the commencement of this action plaintiffs were the owners of all the right, title and interest which William J. Shaw and John W. Kisling, or either of them, ever had in the land in controversy, also of all the title which Eugene L. Sullivan ever had therein.

That the lands in dispute in this action are included within what are known as the "Pueblo lands" of San Francisco, and that they are not within any reservation for military purposes, nor for previous Spanish or Mexican grants. (Records, p. 26.)

That the map marked "Exhibit C" between pages 40 and 41 of Record, is a correct section of the Van Ness map, showing the property in controversy and its surroundings, and that the Van Ness ordinance, as recited in the Statutes of California, pages 52, *et seq.*, is in evidence, and is correctly published in that volume.

That the decree of the District Court of the 12th Judicial District, in and for the City and County of San Francisco, introduced in evidence as "Exhibit A," Record pages 32 to 40, included the part of the premises claimed by plaintiffs, in this action, which is described by metes and bounds in Exhibit B, stipulation, page 11 of Record. Stipulation, Record page 12, fol. 18.

That the portion of the premises described in the complaint lying south of the red line projected easterly from Harrison street from the northerly line of Four-

teenth street, as delineated on said map, is claimed by plaintiffs under the so-called "Thorne and Center" title. (Stipulation, p. 13 of Record.)

That the land in controversy is within the charter line of 1851 of the City and County of San Francisco, Record p. 26; that this charter line is the same mentioned and referred to in the Van Ness ordinance, correctly published in the Statutes of California, 1858, p. 52.

That the premises are within the four square leagues described in the decree of the United States Circuit Court for the District of California, made May 18th, 1865.

Also that these premises are within the lines of the patent from the United States to the City and County of San Francisco for the pueblo lands issued in 1884. (Record, p. 31.)

The specifications of error relied on is the decree of the United States Circuit Court, 9th Judicial Circuit and District of California, decreeing that complainants are the owners in fee simple absolute of the premises mentioned in the Bill of Complaint in that action, and adjudging and decreeing that the City and County of San Francisco has no estate or interest in the real estate designated in that decree, and debarring and enjoining the said city and county from asserting any claim or interest in that real estate and the rendition of the same without sufficient evidence to justify its rendition. (Record, pp. 8, 9 and 10, fols. 12 to 15, and pp. 10 to 40.)

The points of law are, that the judgment of the District Court of the 12th Judicial District, marked "Exhibit A," pp. 32 to 40 of Record, was not a bar and did not estop the city from setting up or claiming title to the property in controversy, in this action, under the Act of Congress of July 1st, 1864, and that that decree of the 12th District Court, in and for said city and county, should not have been considered as evidence in this case; also that the remainder of the evidence set forth in the record is insufficient in law to sustain the decree of the United States Circuit Court, above mentioned.

ARGUMENT.

The Stipulation "B," page 12 of Record, by designating the property in controversy, as that shown on map "B" within the green lines enclosed by the blue lines, representing the exterior boundaries of plaintiff's entire claim, avoids the necessity of considering the Center and Thorne title, because whatever title plaintiffs may have, or ever had, to the land represented as within the green lines on map "B," is derived from and through William J. Shaw, John W. Kisling and Eugene L. Sullivan. A portion of the land in dispute is within the red or pink lines representing the boundaries of the "original Shaw claim," which, where it extends through that land, also represents a part of the southerly and south easterly boundary line of the Shaw claim, as defined by the Decree Exhibit A of Record pp. 32 to 40. The metes and bounds thereof, so far as it affects plaintiff's present claim, being agreed upon and defined by courses and distances in "Exhibit B" Stipulation, Record p. 11.

The decree marked "Complainant's Exhibit A," plead in the complaint in this action, Record pp. 1, 2 and 3, and introduced in evidence, over the objection of defendant, Record pp. 10 and 11, fols. 15 and 16, is not, we submit, competent evidence in this case, because at the time of the rendition and entry of that decree, May 13th, 1861, the title to the land in controversy in that action was not in the City and County, and could not be presented to the Court, but it then was in the United States.

It was a part of that tract granted to the City of San Francisco by the Act of Congress of July 1st, 1864, U. S. Statutes at large, vol. 13, pp. 332 to 334, considered in evidence—Record p. 31; also within the lines of the patent issued to the city in 1884.

In the case of The People *vs.* Holliday, 68 Cal., pp. 440 to 445, and cases therein cited, the nature of the title of San Francisco to its Pueblo lands is fully discussed, and it is held substantially, that a judgment of the character of that plead by plaintiffs in this action, is not a bar.

In the case of Shaw *vs.* defendant, the attorney representing the City and County filed the disclaimer of the defendant to all interest in the property in controversy in that action (Record pp. 35 and 36), and his power to do so is not shown. There is no statute of California authorizing the law officer of the city to disclaim its interests in its real property. Broadly vs San Francisco, 124 Cal. 12

If, however, it were a bar it could only extend under the provisions of Stipulation B (Record p. 11) to the portion of the land in dispute, represented on map B within red or pink lines, since those red lines by the distances and courses marked on the same follow the decree, as stipulated by the above stipulation.

If the decree in Shaw *vs.* The City and County constitutes no bar to the defense in this action, it cannot be deemed a source of title.

The deed of the Tide Land Commissioners of the State of California to Eugene Sullivan (Record p. 25) could not convey any interest in land lying within the Pueblo, and this is conceded to be a part of the Pueblo lands.

These Commissioners could only convey lands belonging to the State. (Swamp and tide lands.)

So plaintiff's case rests, I submit, wholly upon such title as it may have proven by possession of their grantors, or predecessors, or some one of them, at the times required to entitle them to the ownership of the property under the Van Ness ordinance, in case the property was not reserved by the city under the provisions of Sections 4 and 5 of that ordinance.

Section 2 of that ordinance, Statutes of California of 1858, pp. 52 and 53, "grants all the claim of the city "to the lands within the corporate limits to parties in "actual possession thereof, by themselves or tenants, "on or before the first day of January, 1855 * * "provided that such possession has been continued up "to the time of the introduction of this ordinance," etc. The time of the approval of that ordinance is March 11, 1855.

Kisling was the original claimant to the land in dispute. A paper is in evidence denominated the preemption claim of John W. Kisling, Record p. 14. It

will not I presume be seriously contended, that by this paper, he acquired any title to the property in dispute. There is no other paper in evidence purporting to show any claim of Kisling to the property.

On the 12th day of September, 1859, he and his wife Maria executed a deed by which they purported to convey (among other lands) that, in dispute in this action, to William J. Shaw—and whatever interest they, then had, in that property was transferred thereby, to William J. Shaw. Shaw appears from the evidence to have had no other title to the property. If he was entitled to the benefit of the Van Ness Ordinance as an actual possessor, of the land in controversy, on the 1st day of January, 1855, and at the time of the introduction of that ordinance, it should have been shown by the evidence.

The map "B" showing the western line of Mission Creek in red lines, bisects the tract in controversy, shown in green lines, and the blue lines to the right of the red lines show the center of the creek. Witness Thorne testifies (Record p. 17, Fol. 25). "From 1849 or 1850, up to that date, Kisling continued in the occupation, dwelling upon these premises and protecting them from intrusion by enclosures and putting them to such uses, as he required for his stock and other purposes.

Referring particularly to that tract represented on the map exhibit "B"; within the blue line, and lying to the north of the north line of Fourteenth street extended, I know that Kisling was in the continuous, and uninterrupted possession of that land from 1849 up to the time of his conveyance to Shaw, which was September 12th, 1859."

The witness could not have meant the land to the center of the creek for in describing the creek he says:

"I have traveled up it in boats a great many times, The creek formed the boundary. The south side of the creek was the De Haro grant * * * This creek was so good a barrier that cattle * * would not pass over. It was generally used as a barrier between adjoining proprietors." (Record pp. 18 and 19.

Boats could not have passed up the center of that

creek if there was a fence or other enclosure there; so as to that statement, the witness must have meant constructive possession, the actual possession must have applied to the house and some vaguely defined enclosures around it.

Corbett's evidence, (Record page 21.) as to Kisling's possession when shown the map, Exhibit B, is, "I wouldn't be positive about those lines represented on the map, being exactly correct, but I know that he, 'Kisling' had the whole of that property enclosed on the *north side of the creek* and I know that he had up to the Thorne and Center line." Record page 21.

Shaw who was the successor of Kisling explains the alleged possession better than any other witness and says, relating to the time he was the claimant of the premises, Record page 25. "From the time of the conveyance of those premises to me until I sold to Sullivan I had nominal possession, the same as anybody who has a grant of premises, I never had a house on the land, or lived in it. I don't think it was separately enclosed. It was in the undisputed possession of John W. Kisling when I bought it and it was deemed to be in my undisputed possession up to the time I sold it." If the evidence as to the actual possession can be construed to be sufficient to the westerly line of the creek, it seems, that it cannot, in the light of the facts stated by the witness, be made to extend to the center of that creek, but I submit that the testimony is not sufficient to entitle plaintiffs as successors of Shaw to the benefit of the Van Ness Ordinance grant, certainly not sufficient as to the space, between the blue and red lines, respectively marking the center and western lines of Mission Creek.

On that section of the Van Ness map, there is a space marked "Channel" in black lines running directly through the land in dispute, its direction is from southeasterly to northwesterly, upon this section of that map is marked blocks on both sides of the creek, or channel, and the space between is left open between blocks marked by numbers, the very fact of its being left open, and its being the bed of the creek shows an intention on the part of the city to reserve it.

The beginning of this space marked "Channel" on the left of that section of the map corresponds to that system of streets of which Alabama, Columbia and Flordia streets compose a part. It is fair to assume from this section of the map that Columbia street did extend to the westerly line of Block 46, it is marked by Block 210 on its southerly side to the very verge of plaintiff's claim. The city's contention is that all of the open space shown on the Van Ness map between blocks was reserved. Channel street as shown on that map leads into the open space which covers the land in dispute: On the map "B" (strangely) the numbers are not put on blocks—on the section of the Van Ness map marked "C" they do appear.

The evidence as to the possession before, or since the date of the Van Ness Ordinance, however, uninterrupted and continuous, in plaintiff, and their ancestors and grantors, could give no title as against the city, if the property in controversy is shown upon the Van Ness map to have been designated or intended as a street, and the evidence of one of the Commissioners could not destroy the effect of facts shown upon that map.

Respectfully submitted,

GEORGE FLOURNOY,
City and County Attorney,
Attorney for Defendants.

Addenda. Part of Van Ness Ordinance.

SECTION 1.

It shall be the duty of the Mayor to enter, at the proper land office of the United States, at the minimum price, all the lands above the natural high-water mark of the Bay of San Francisco, at the time of the admission of California into the Union as a State, situated within the corporate limits of the City of San Francisco, as defined in the Act to incorporate said city, passed April fifteenth, one thousand eight hundred and fifty-one, in trust for the several use, benefit and behoof of the occupants or possessors thereof, according to their respective interests.

PART OF SECTION 2.

The City of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January A. D. one thousand eight hundred and fifty-five, to their heirs and assigns forever; excepting the property known as the slip property, and bounded on the north by Clay street, on the west by Davis street, on the south by Sacramento street, and on the east by the water-lot front. And excepting, also, any piece or parcel of land situated south, east or north of the water-lot front of the City of San Francisco, as established by an Act of the Legislature of March twenty-sixth, A. D. one thousand eight hundred and fifty-one; provided such possession has been continued up to the time of the introduction of this ordinance in the Common Council.

SECTION 4.

The City, however, as a consideration annexed to the next two preceding sections, reserves to itself all the lots which it now occupies, or has already set apart for public squares, streets, and sites for school houses, city hall, and other buildings belonging to the corporation; and also such lots and lands as may be selected

and reserved for streets and other public purposes, under the provisions of the next succeeding sections.

SECTION 5.

The City shall have the right to proceed to lay out and open streets, as soon as the corporation may deem it expedient, in that part of the City west of Larkin street and southwest of Johnston street, and reserves the right to take possession of such lands as it may be necessary to occupy for that purpose, without compensation; and to assess in the manner provided by the present or any existing charter of the City, upon the lands bounded on such streets, the whole expense of laying out, opening, grading and constructing the same; the payment of the costs of said improvements shall be deemed a charge upon the lands mentioned in this section, to which the City of San Francisco relinquishes her right and title by the second and third sections of this Ordinance.